JUN 13 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1955

No. 143

BEATRICE A. ANDERSON, as ADMINISTRATRIX Of The ESTATE OF CHARLES ARTHUR ANDERSON, JR., DECEASED,

Petitioner,

versus

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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SUPREME COURT OF THE UNITED STATES.

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Petitioner,

versus

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND APPENDIX.

To The Honorable The Supreme Court of The United States of America:

Petitioner respectfully petitions this Honorable Court to grant the Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in the above cause.

In this behalf, Petitioner shows unto the Court:

I.

OPINION OF THE COURT BELOW.

Atlantic Coast Line Railroad Company, Appellant v. Beatrice A. Anderson, as Administratrix of the Estate of Charles Arthur Anderson, Jr., Deceased, Appellee, Fed. (2d) (not yet in print) (R. 348 and see Appendix to this Petition.)

II.

STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

Date of judgment to be reviewed, April 6, 1955 (R. 358), (Appendix A), as amended by order denying rehearing, May 11, 1955, (R. 364), (Appendix B).

Stay of Mandate, May 18, 1955 (R. 366), (Appendix C).

Statutory provision believed to confer on this court jurisdiction to review the judgment in question. 28 U.S. Code, Sec. 1254 (1). (Appendix D.)

The rights, privileges, and immunities here claimed arise under the Federal Employers' Liability Act, 35 Stat. 65, 36 Stat. 291, 53 Stat. 1404, 45 U. S. Code, Sections 51-60.

III.

THE QUESTION PRESENTED FOR REVIEW.

The question for decision is whether or not there are probative facts in the record to support the finding of the jury that there was negligence by the defendant which contributed, in whole or in part, to the death of Petitioner's decedent.

The District Judge held (R. 303) that there was.

The Court of Appeals held (R. 348) that there was not.

(1) In the course of a normal operation of "jerking a car by", performed in the customary manner and with the car being given a jerk which should have caused it to roll but did not, as a result of which the engine and the car were connected by a chain carried for that purpose and the car was set in motion by the engine, which was then stopped as the car was rolling and deceased went in front of the car to detach the chain but was unable to do so in three tries before being caught between the end of the car and the taut chain, could the jury have found that there was a defect or insufficiency due to defendant's negligence, in the car which contributed, in whole or in part, to the death, or

2. Given the facts as related above, could the jury have found that the engineer, who witnessed the entire movement, was negligent in failing to warn deceased of his danger by whistle, bell or other means, other than shouting at him "a few seconds" before he was caught?

IV.

STATUTES INVOLVED.

The statutes involved are:

28 U. S. Code, Sec. 1254 (1), (Appendix D), Page 30.
45 U. S. Code, Sec. 51, (Appendix E), Page 31.
45 U. S. Code, Sec. 53, (Appendix F), Page 32.
45 U. S. Code, Sec. 54, (Appendix G), Page 33.
45 U. S. Code, Sec. 56, (Appendix H), Page 34.

V.

STATEMENT OF THE CASE.

(a)

The Material Facts.

This action was brought in the United States District Court for the Southern District of Florida, Jacksonville Division, by Petitioner as the personal representative of her husband, Charles Arthur Anderson, Jr., deceased, an employee of Respondent, under the Federal Employers' Liability Act, 45 U. S. Code, Secs. 51-60, to recover damages for her husband's death suffered in an accident on November 4, 1950, as a result of the alleged negligence of Respondent. (R. 1-9.)

Plaintiff's decedent was a conductor of a freight train running between Sanford, Florida, and Jacksonville, Florida, engaged at the time of his injury and death in switching a refrigerator car on the tracks of the defend-

ant at Crescent City, Florida. In addition to deceased, the crew consisted of one Singletary, as brakeman; Lee, as flagman; Futch, as engineer; and Walden, as fireman.

The refrigerator car was standing on the house track at Crescent City, Florida. Plaintiff's decedent had orders to place it in his train and carry it to Jacksonville. It was necessary that the engine couple up to the car with its front end.

When the train reached Crescent City, the brakeman held on to the four cars next to the engine which were uncoupled from the rest of the train; a switch was turned permitting the engine to move forward on a crossover track, from the main line track, to the track on which the refrigerator car was standing. It was necessary to couple to and jerk this car by in order to get it behind the engine so that it could be placed in the train. The manner of making this switch is set out in Pararaph 7 of Count II of Petitioner's complaint. (R. 6.)

After the brakeman attempted to release the air brake from the refrigerator car and had attempted to release the hand brake, signal was given for the engineer to move the engine in a backward motion to complete the switching movement. A speed of from 12 to 15 miles per hour was attained by the locomotive when, upon signal being given, the engineer gave slack to allow the brakeman to uncouple the car from the front of the engine; the engine, with four cars attached, moved back over the crossover switch toward the train; deceased then turned the switch

to permit the car to roll down the house or team track, but the car failed to roll and stopped on the crossover track, fouling the same. A chain was provided on the engine to pull by cars that had failed to roll. As the engineer testified (R. 188): "I have had a lot of occasions to do that, that's what the chain is put on there for". Defendant's witness, Futch, further testified (R. 164) that the deceased was a careful worker on the railroad; that the movement had been done by the deceased and Mr. Futch a hundred times or more and the way that deceased was doing the job that day was the way it was customarily done and that at the time Anderson got killed he wasn't doing anything out of the ordinary except what was customarily done in movements of that type. (R. 188.)

Defendant's witness, Futch, after testifying that the speed the car was being jerked was a sufficient speed for it to have rolled into the clear, could not tell the jury why the car did not roll in the clear. (R. 183.) He testified (R. 184): "There was sufficient speed for it to roll in the clear in the usual manner, but it stopped on the switch—the crossover frog . . . it was going fast enough to roll in the clear; however, it didn't roll".

It was shown that the car was approximately 40 feet long and from the point where Futch was seated on his engine to the front of the engine was approximately 40 feet.

Defendant's witness, Futch, testified that after the chain was fastened to the car and to the front of the locomotive and he had started the locomotive and car rolling,

Anderson, deceased, went in between the chain and the car, as he and Anderson had done hundreds of times in the past 15 years, to disconnect the chain from the car; Anderson made an attempt to disconnect the chain from the car but was unable to do so; that he saw Anderson make two or three other efforts to disconnect the chain from the car but he was unable to do so; that Anderson had his back to the car and rolling car caught Anderson between the chain and the car, resulting in his death.

Futch testified (R. 189): "I saw the car was going to overtake him so I hollered, 'Look out, you are going to get caught' . . .evidently he didn't hear me; he didn't come out". Anderson made two more efforts to get the chain off after Futch yelled to him. (R. 177.)

In Count II of the complaint (R. 7, Par. 11, and R. 8, Par. 12) the acts of negligence alleged to have been the proximate cause, in whole or in part, of the death of decedent are set out, among them being: "By and through its engineer in failing to warn deceased by horn, gong, whistle or signal of other sort of the danger; in having in its train a car that would not roll when jerked. . . or when an attempt was made to move the same in the usual, normal and customary manner; in failing to maintain said car, track and roadbed in such condition that the car would roll when attempt was made to switch the same as in the complaint described; and the injury to and death of decedent which resulted in whole or in part by reason of a defect or insufficiency due to defendant's negligence in its cars, track and roadbed".

It was shown that the engine being used was a steam engine equipped with a whistle (R. 190-191); that in order to blow the whistle, all the engineer had to do was to pull a cord which was hanging down in the cab of the engine within arm's length; that the whistle on the locomotive could be heard for several miles. Futch admitted that he did not blow the whistle to warn Anderson that he was about to be caught between the chain and the car. He did testify (R. 194) that at the time he hollored to Anderson, Anderson had time to get out before he was caught and that, had he blown the whistle, Anderson would not have known what he was blowing it for. He did admit that it would have warned him that something was wrong.

Plaintiff showed by expert witnesses that there was probably a defect (dirty piston) in the air brake on the car in that it failed to release a piston when the brakeman attempted to release the air before the first jerk was made. (R. 132.) This witness further testified that a speed of 8 to 10 or maybe 12 miles per hour would have been a sufficient speed for the car to have rolled in the clear under all conditions. (R. 127, 128, 130, 131.)

After describing how a dirty brake piston would prevent the air from being released from the brake cylinder under the car, (R. 132) he stated that: "The vibrations in moving the cars, the jerk they gave them at first, causes the brake cylinder to go back in and that releases the brake off of the car".

> Q. "That releases the brakes that were on the car when the first jerk was attempted, is that your answer?
>
> A. "Yes, sir." (R. 135.)

It was testified by plaintiff's expert witness, Raborn, that the air brake and the hand brake work on the same rigging and that "At that speed you would have to have a brake on it some way; that was the only thing in my opinion that would have prevented the car from rolling and that as long as the piston is out the brake is on". (R. 81), (See R. 116-117 also). There was no contradiction of this evidence.

Plaintiff's witness, Raborn, sustained witness, Wood, as to the reason why the car failed to roll on the first jerk (R. 86).

Defendant's witness, Lee, the flagman on the train, testified that he had made similar movements at the same place (Crescent City) numerous times, and the car should have rolled in the clear at the speed it was jerked (10 to 12 miles per hour) (R. 162) "and it should have rolled in the clear if there wasn't something wrong with it?" "Well, it should roll in the clear."

From the above statement of fact the jury could have inferred that the failure of the engineer to warn the deceased by horn, gong, whistle or signal of other sort, or the failure of the car to roll when jerked in the usual, normal and customary manner, was the proximate cause, in whole or in part, of the death of the decedent. At the close of all of the evidence Respondent moved for a directed verdict upon the ground that there had been no showing of any negligence on the part of the defendant (R. 240). The court overruled the motions and submitted the case to a jury which returned a verdict for the plaintiff in the sum of $30,000.00.

Motion for new trial was denied with opinion (R. 299) and on appeal the Court of Appeals for the Fifth Circuit reversed (R. 358); petition for rehearing was denied (R. 364) and stay pending application for this writ was granted. (R. 366.)

(b)

Basis for Federal Jurisdiction in District Court.

Jurisdiction in the District Court, the Court of first instance, was based upon the provisions of 45 U. S. Code, Section 56. (Appendix H.)

VI.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

In recent years this Court has had occasion, in many instances, to express itself regarding the respective functions of the Court and jury, including the scope of appellate review in cases arising under the Federal Employers' Liability Act. The basic decisions are collected and set forth in *L. & N. R. Co. v. Botts,* 173 Fed. (2d) 164, 167, (C.C.A. 8, 1949); to-wit:

> *Tiller v. Atlantic Coast Line R. Co.,* 318 U. S. 54, 58, 63, S. Ct. 444, 451, footnote 30, 87 L. Ed. 610, 143 A. L. R. 967; *Bailey v. Cent. Vt. R. Co.,* 319 U.S. 350, 63, S. Ct. 1062, 87 L. Ed. 1444; *Tennant v. Peoria & P. U. R. Co.,* 321 U. S. 29, 32-35, 64 S. Ct. 409, 411, 412, 88 L. Ed. 520; *Lavender v. Kurn,* 327 U. S. 645, 66 S. Ct. 740, 744, 90 L. Ed. 916; *Wilkerson v. McCarthy,* 69 S. Ct. 413, 417, 418. The decision of the court below is in direct conflict with the principles

of law announced by this Court in the above cases on the question of when a case arising under the Employers' Liability Act raises a question to be passed on by a jury.

To these decisions may be added the cases of:

Stone v. N. Y. C. and St. L. R. Co., 344 U. S. 407, 73 S. Ct. 358, 97 L.Ed. 441;
Carter v. St. Andrews Bay R. Co., 338 U. S. 430, 70 S. Ct. 226, 94 L. Ed. 236;
Affolder v. N. Y. C. & St. L. R. Co., 339 U. S. 96, 70 S. Ct. 509, 94 L. Ed. 683;
Coray v. Sou. Pac. Co., 335 U. S. 520; 69 S. Ct. 275, 93 L.Ed. 208.

The decision herein complained of is in conflict with the decisions of this Court in the latter cases on the question of proximate cause.

Thus it seems clear that if there are evidentiary facts which, as a matter of law, constitute negligence, the jury's verdict and the District Court's denial of motion for new trial should not be reversed on appeal by a ruling converting contributory negligence into sole negligence. ~~*Tiller v. A. C. L. R. Co.*, 318 U. S. 54, 58, 63 S. Ct. 444, 87 L.Ed. 610. *Owens v. U. P. R. Co.*, 319 U. S. 715, 63 S. Ct. 1271, 87 L.Ed. 1683, 1687~~.

On the facts, Anderson's conduct amounted to no more than contributory negligence as pointed out by the learned trial judge in his order denying the motions of Respondent. (R. 302-304.)

That, plus the failure of the Court of Appeals to consider in its original opinion and its refusal to consider on

petition for rehearing the question of the negligence of Respondent in the defect of the car which kept it from rolling, cause us to ask that this Court review this case.

We submit that the decision below, so far as it goes, is contrary to the considerable body of law as established by this Court delineating the functions of Court and jury and setting forth the nature and scope of appellate review, and that the failure and refusal of the Court of Appeals to consider the defect in the car is such a departure from proper and accepted judicial procedure as to warrant this Court to exercise its power of supervision.

In this case the evidence shows that when attempt was made to "jerk by" the refrigerator car it should have rolled over the crossover track, but did not. No one knew why it did not roll in the clear. There was testimony that some defect in the braking system, probably a dirty piston, was the cause. (R. 86) (R. 133-134.) It was not necessary to prove to a certainty the specific cause. ~~*Jesionowski v. B. & M. R. Co.*, 329 U. S. 452, 67 S. Ct. 401, 91 L.Ed. 416.~~

The Court of Appeals held that Anderson's negligence was the sole proximate cause of his death. It held that there was no showing of negligence on the part of the Respondent. (R. 357.)

It is the contention of Petitioner here, as it was below, that the Respondent was guilty of negligence which contributed, in whole or in part, to the death. Failure of the car to roll set in motion a chain of causation resulting in

the death of Anderson. Again on the question of proximate cause the decision of the court below is contrary to and in conflict with the decisions of *Eglsaer v. Scandrett,* 151 F. (2d) 562; *O'Day v. Chi. R. & I. R. Co.,* 216 F. (2d) 79, (C.C.A. 7).

And, as to the duty to warn, the decision below is in conflict with *Ellis v. U. Pac. R. Co.,* 329 U. S. 649, 67 S. Ct. 598, 91 L. Ed. 572.

PRAYER.

For the reasons herein given, Petitioner prays for a Writ of Certiorari directed to the Court of Appeals for the Fifth Circuit to the end that the judgment of that Court may be reviewed by this Court and reversed with directions that the judgment of the trial court be affirmed.

Respectfully submitted,

THOMAS J. LEWIS,
Attorney for Petitioner.

T. J. LEWIS, JR.,
RICHARD M. MAXWELL,
Of Counsel.

CERTIFICATE OF SERVICE.

This is to certify that I have this day served T. Malcolm Kirby and Howell & Howell, Attorneys for Respondent, 601 Atlantic National Bank Building, Jacksonville 2, Florida, with a copy of the Petition for Writ of Certiorari and Appendix in the above stated case by depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon.

This the .... day of ....., 1955.

.....
Attorney for Petitioner.

APPENDIX.

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APPENDIX A.

OPINION, UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 15224.

ATLANTIC COAST LINE RAILROAD COMPANY,
Appellant,

versus

BEATRICE A. ANDERSON, as Administratrix of the Estate of CHARLES ARTHUR ANDERSON, JR., deceased,
Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(April 6, 1955).

Before HUTCHESON, Chief Judge, TUTTLE, Circuit Judge, and DAWKINS, District Judge.

HUTCHESON, Chief Judge: Brought in two counts, one under the Safety Appliance Act (45 U.S.C. Sec. 11), the other under the Federal Employers' Liability Act (45 U.S.C., Secs. 51-60), the suit was for damages resulting from the death of plaintiff's decedent.

The first count charged failure to provide sufficient hand brakes. The claim of the second count was in sub-

stance that while plaintiff, as the conductor of a train crew, was engaged in directing and conducting a switching operation, he was, as a result of the negligence [1] of defendant, its agents and servants, caught and crushed to death between the refrigerator car and the chain by which it was attached to the engine.

The defendant specifically denied the charges of each count, and, on the issues joined, the cause was tried to a jury. The evidence in,[2] plaintiff moved for an in-

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[1] (1) Due to a defect in its car, track or roadbed, the refrigerator car failed to roll clear of the crossover track in the first instance prior to the fastening of the chain and the subsequent movement.

(2) The engineer failed to move the engine when he saw the deceased would be caught between the car and the chain.

(3) The engineer, although he saw the deceased in a place of danger, failed, at the time, to warn the deceased by horn, gong, whistle or other signal.

[2] Charles Arthur Anderson was the conductor of train 532 being operated from Sanford, Florida, to Jacksonville, Florida, on Nov. 4, 1950, by the defendant.

The train was a freight train and the engineer had been given instructions by Mr. Anderson that a car of perishables was to be picked up in Crescent City, Florida on the way north. The engine was stopped on the main line in Crescent City about four car lengths from the "south crossover switch" leading to a "team-track" where car FGE 52709, the car in question, was parked. The engine and four cars were disconnected from the rest of the train, and Anderson gave instructions to the crew to take the engine and four cars into the "team track" by means of the crossover. The engine and four cars moved through the crossover in a northerly direction, the front of the engine was coupled to the refrigerator car, and Anderson then gave a signal to "jerk the car by". This movement is best described by the plaintiff's witness, Singletary, the brakeman, when he said that after the car is coupled and the engine starts backing up then "when a certain amount of speed was attained, the engine slowed down allowing slack to bunch. Then the car was cut loose from the engine and after the engine crossed the crossover switch, the switch was thrown allowing the car and engine to go down different tracks". After the car was cut loose in this instance it failed to clear the crossover and stopped in a position fouling it.

When it appeared that the car had not rolled into the clear Conductor Anderson and Brakeman Singletary got a 14 foot long

structed verdict for the plaintiff on count one,[3] while defendant moved for such a verdict in its favor on both counts.

These motions were denied, and there was a verdict on the first count in favor of defendant and on the second count in favor of plaintiff, and a judgment on the verdict for $30,000.00.

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chain off the engine for the purpose of having the car pulled into the clear to the point of the team track south of the crossover. Singletary attached one end of the chain to the engine and Anderson attached the other end to the refrigerator car. On signal from Anderson the engineer was instructed to move the engine backward, or southward, so as to pull the car clear to the crossover.

After several jerks on the chain the car commenced to roll and upon signal by Anderson the engine was stopped while the refrigerator car continued to roll. "Then the conductor, Mr. Anderson, walked in the head of the car, between the chain and the car to disconnect the chain from the car, which he failed to do" (Rec. 75). As the refrigerator car rolled south at three to four miles per hour Conductor Anderson was walking southward at the south end of the car with his back to the car, his face to the engine, with the chain in front of him. None of the members of the crew except Engineer Futch were in positions where they could see the events occurring after the car started moving. Anderson made one attempt to disconnect the chain from the car, and the Engineer hollered and "told him to get out, he was going to get caught".

After that Anderson made two more attempts to disconnect the chain and the car came up behind him and caught him. From the time Futch yelled at Anderson until he was caught between the car and the chain only a few seconds elapsed. Futch did not know whether Anderson heard him yell or not, but testified that Anderson "was right there" at a distance of about twenty-five feet from where Engineer Futch was sitting. After being caught as above described Conductor Anderson was conscious for a short time and died within 10 or 15 minutes.

[3] "Mr. Lewis: We would like to move for a directed verdict for the plaintiff on Count One of the cause which alleges the violation of the Safety Appliance Act. We have shown, I believe, to the satisfaction of the Court, that the car failed to roll when it was jerked in the usual and ordinary, customary manner. The evidence is that it had speed enough to have gone into the clear if there had not been some defect or something wrong with the car; and *the evidence in the case is that the braking apparatus was the cause of the car failing to roll.*" (Emphasis supplied.)

Assigning a single error, the denial of defendant's motion for a directed verdict, defendant is here insisting that there was no evidence showing or tending to show that there was negligence on the part of defendant, proximately causing Anderson's death, and that the evidence established as matter of law that his death resulted directly proximately and solely from his own negligence and without fault on the part of the defendant.

Pointing out: that the jury decided, in favor of defendant, that there was no defect in the brake; and that there was a complete failure of the evidence to point to any defect in the car, track, or roadbed which caused, or had contributed to Anderson's death; appellant urges upon us that there is equally no basis for a finding that the engineer was negligent either in failing to move the engine when he saw that the deceased would be crushed or in failing to warn him by bell or whistle of his danger. A reading of the undisputed and unimpeached testimony [4]

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[4] Q. "Now, you make that movement down there a whole lot of times, don't you?"

A. "I have had a lot of occasions to do that. That is what the chain is put on there for."

Q. "And the way Mr. Anderson did that job that day was the way it was done all the time, wasn't it?"

A. "I have done it a hundred times or more myself."

Q. "I say the way you did it that day is the way it was customarily done, isn't that right?"

A. "Usually."

His evidence further shows that after the engineer had gotten the refrigerator car in motion by pulling it with the chain, the engine was stopped and deceased, walking in front of the moving car, which was rolling on the transfer track on an angle with the engine and moving up to it to pass it, undertook to disconnect the chain from it. In thus walking, the deceased was in the performance of his duties doing what was the customary in such a movement. It was a dangerous thing to do but it was customary. He was walking in front of the car, his back to the car facing the engine when he gave the signal to back up and was about 40 or 45 feet from Futch.

of Futch, the only eye witness, that in using the chain method of "jerking the car by", Anderson, under whose direction and control the work was being done, was doing the job in the usual and customary manner, in the same way, indeed, in which he and Futch had performed over a fifteen year period, convinces us that this is so.

On the claim that the engineer was negligent in not, of his own motion and contrary to the order and direction of the conductor to stop the engine, suddenly moving the engine and four heavily loaded cars so as to avoid injury to the deceased, we think it quite clear that plaintiff did not make out a case.

The undisputed and unimpeached evidence of the engineer, the only eye witness, establishes that this could

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Q. "And you obeyed that signal?"
A. "I certainly did."
Q. "And Anderson then was between the chain and the car, is that right?"
A. "Not at that time."
Q. "Where was he then?"
A. "He was walking along the side of the car and when he got the car rolling, the speed of the car he wanted, then we walked in ahead of the car."
Q. "Between the chain and the car?"
A. "Yes."
Q. "Now you make that movement down there a whole lot of times, don't you?"
A. "I have had a lot of occasions to do that. This is what the chain is put on there for."

Deceased made one attempt to release the chain, the engineer called to him to look out, after which he made two more attempts to release it before the chain caught him against the end of the car. A few seconds elapsed between the time the engineer called to him and the time he was caught. When questioned whether he could have moved the locomotive in time to save Anderson's life, he testified no.

Q. "You could have given it steam, though, couldn't you? You had the throttle there didn't you?"
A. "The man was done caught then."

not have been done,[5] and it is settled law that, with the record standing thus, the jury may not disregard his testimony to turn to speculation. *Pennsylvania Ry. Co. v. Chamberlain,* 288 U.S. 333 at page 341, Cf. *Arnall Mills v. Smallwood,* 68 F (2) at p. 59; and *Kuykendall v. United States Gas Pipe Line,* 208 F (2) 922.

Under the orders of the deceased the engine had been brought to a complete stop, the engineer had not been directed, there was no occasion for him, to keep his steam up, and he testified without contradiction that with the heavy cars behind him it was impossible for him, when he realized Anderson's peril, to make the move suggested.

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[5] "Now how many cars did you have on your locomotive at the time you were sitting there during this matter of seconds between the time you saw Mr. Anderson at the point of danger and the time he was caught, how many cars did you have on your locomotive?"

A. "I had four cars behind the engine."

Q. "Did you have time to move the train between that time?"

A. "No, sir, not then."

Q. "Is there any motion you could have made to have pulled the train back in that lapse of time?"

A. "I didn't have time to do that; all I had time to do was to holler and tell him to get out before he got hurt, that's all the time I had before he got hurt."

Q. "I say, you could have moved your locomotive, couldn't you?"

A. "Not quick enough to save his life, no."

Q. "You could have given it steam, though, couldn't you, you had the throttle there, didn't you?"

A. "The man was done caught then."

Q. "Steam locomotives when you pull on the throttle, pick up motion, don't they?"

A. "It depends on the valve opening, how much steam you have got."

Q. "This particular engine this day, was it pretty fast on the opening?"

A. "If it is a light engine, yes."

Q. "You don't think you could have gotten out of the way if you had started to move your engine any at all?"

A. "Not with four cars of pulpwood behind me, no."

In addition, deceased was walking in front of the moving car and between it and the engine and it would have been an impossibility even if the engineer could have suddenly started the engine to have done so without extreme danger to the deceased who was walking in front of the car and the engine which were linked together by a chain not more than fifteen feet long.

Neither is there basis in the evidence for a finding that the engineer should have warned the conductor of his position of danger by blowing a whistle or ringing the bell. Assuming that such a signal, sounded only twenty feet from him, would have been understood by the conductor as a warning to him and also would not have caused him to freeze in a position of peril, the circumstances of the case establish beyond question that there was no legal duty on the engineer to do this Anderson was in charge of the whole operation, an operation which he had performed many times, and there was no reason for the engineer to suppose that Anderson was not fully aware of his situation. The engineer did shout when he realized that Anderson was apparently not sufficiently alert to his danger, but Anderson either did not hear him or thought he still had time to pull the pin and let the car roll by.

We think it cannot be contended otherwise than that as matter of law the conductor was the active author of the chain of circumstances which caused his death. If, as seems to be established by the evidence, it was not negligent in him to conduct the operation in general as he was doing, we think it may not be doubted: that in

taking a position in front of the car so that as the following car moved toward the engine it would draw the chain around him, and in placing and keeping himself in this position, from which no one but himself could extricate him, the deceased was solely responsible for his own death; and that certainly his own fault may not be imputed to defendant as negligence on its part.

It is still the law that in a case of this kind, proof of negligence on the part of defendant is essential. "The Federal Employers' Liability Act does not make the employer the insurer of the safety of his employees while they are on duty . . . The basis of his liability is his negligence, not the fact that injuries occur." *Ellis v. Union Pacific,* 329 U.S. 649.

Quoting from *L. & N. R. Co. v. Botts,* 173 F (2) 164, in which decisions of the Supreme Court, including *Tiller v. Atlantic Coast Line,* 318 U.S. 54, *Lavender v. Kurn,* 327 U.S. 645, *Bailey v. Central Vt. Ry. Co.,* 319 U.S. 350, and *Tennant v. Peoria & P. U. R. Co.,* 321 U. S. 29, are gathered and commented on, and discussing those cases, appellee presses upon us his contention that the Supreme Court has in fact and in effect, though not in terms, held that in employers' liability cases the jury is the judge both of the law and the facts and urges that upon their authority the jury's verdict must be upheld. In addition, he argues that, under the rule of *Lavender v. Kurn* and *Ellis v. Union Pacific, supra,* that only where there is a complete absence of probative facts to support the conclusion reached does reversible error in not instructing a verdict appear, there was ample evidence in this case to support the jury verdict.

While it must be admitted that, in the opinions appellee cites, the court has apparently gone a long way in limiting the traditional province of the judge and in enlarging that of the jury in the determination, on the one hand, of whether there is any evidence to take a case to the jury and, on the other, what the effect of the evidence is, the wheel has not yet come far enough over to completely abolish the function of the judge and make the jury in these cases sole judges of the law as well as the facts. It is still the law, that fact and law are separate provinces, fact for the jury and law for the court, and that whether, under the rule of right reason, the evidence as a whole is without probative force, is not a question of fact for the jury but of law for the court. Cf. Law and Fact in Insurance Cases, Texas Law Review, Vol. 23, No. 1, p. 17; Chamberlayne, "The Modern Law of Evidence", Secs. 120 (a), 122, 145, 148 and 149.

Under these principles, appellee's insistence that the engineer was guilty of negligence, in not warning the deceased, will not, we think, do. Mr. Anderson was an experienced railroad conductor of many years. He was the person in charge of the operation and all orders and signals came from him. Using a chain to jerk a car, as was being done at the time, was a usual and constant practice in railroading. With all of this knowledge, Anderson chose to approach the moving car from the west or right side to disconnect the chain. Just as anyone knows of obvious dangers, he, as an experienced operator, knew that in the position he had assumed, the moving car with a fourteen foot chain would soon use up the slack and cause the chain to be pulled taut against him. He could

have approached the front end of the car from the east and left side and been wholly out of harm's way, but he walked in between the car and the chain and at all times the car was moving toward him from behind and he was facing the chain. The situation constituted a clear trap of his own making which was open, obvious and known, and engineer Futch, sitting in his position in the locomotive, knew that Anderson was a man of experience and common sense. This was not the situation of a man new on the job who needed to be warned of the dangers attending on it. It was not a situation where facts were known to the engineer which were not known to Anderson. It was not a situation where Futch, not Anderson, was directing the operations. It took only a few steps for Anderson to place himself in a position of safety around the southwest corner of the car, but he continued his attempts to disconnect the chain and in that brief moment he was caught. How could Futch have known or believed that Anderson would not take himself out of harm's way? How could there be a legal duty to warn Anderson when the situation was perfectly obvious to Anderson and the fatality occurred in a few seconds. The law is well settled that there is no duty to warn of known or obvious dangers and no negligence, therefore, in failing to do so. 65 C.J.S., Negligence, Sec. 89, Notice or Warning of Known or Obvious Dangers, p. 599; 56 C.J.S., Master and Servant, Sec. 296, p. 1057; *Foreman v. T. & N. O.*, 205 F (2) 79.

We realize that in a Federal Employers' Liability case assumed risk is not a defense and that contributory negligence goes only to diminution of damages. This is not a

case of contributory negligence or assumed risk but of sole negligence. In placing and keeping himself in a position of danger between the end of the box car and the chain attached to the front of the locomotive, Anderson was guilty of extreme negligence. While this would only diminish his damages if the defendant was also guilty of negligence, proof that it was is wholly lacking, and Anderson's negligence was, as matter of law, the sole proximate cause of the accident. *Atlantic Coast Line v. Coleman,* 182 F.(2) 712, and cases cited and quoted from in note 4, page 716; *Atlantic Coast Line v. Dixon,* 189 F.(2) 525; and *Stringfellow v. Atlantic Coast Line,* 290 U.S. 322.

The judgment is REVERSED and the cause is REMANDED for further and not inconsistent proceedings.

A True Copy:
Teste:

.....
Clerk of the United States Court of
Appeals for the Fifth Circuit.

APPENDIX B.

JUDGMENT.

Extract from the Minutes of April 6, 1955.

No. 15224.

ATLANTIC COAST LINE RAILROAD COMPANY,

versus

BEATRICE A. ANDERSON, as Administratrix, of the Estate of CHARLES ARTHUR ANDERSON, JR., DECEASED.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further and not inconsistent proceedings;

It is further ordered and adjudged that the appellee, Beatrice A. Anderson, as Administratrix of the Estate of Charles Arthur Anderson, Jr., deceased, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

APPENDIX C.

Order Denying Rehearing.

Extract from the Minutes of May 11, 1955.

No. 15224.

ATLANTIC COAST LINE RAILROAD COMPANY,

versus

BEATRICE A. ANDERSON, as Administratrix, of the Estate of CHARLES ARTHUR ANDERSON, JR., Deceased.

It is ORDERED that the petition for rehearing in the above entitled and numbered cause be, and it is hereby DENIED.

Movant having advised the court that appellee can offer no further evidence than she adduced on the trial and that a reversal, therefore, for another trial would be useless, the opinion is amended so that, instead of providing that the judgment be reversed and the cause remanded for further and not inconsistent proceedings, it and the mandate following it will provide, "The judgment is REVERSED and REMANDED with directions to enter final judgment for the defendant".

APPENDIX D.

Courts of Appeals; Certiorari.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal cases, before or after rendition of judgment or decree. June 25, 1948, c. 646, 62 Stat. 928, 28 U.S. Code Sec. 1254 (1).

APPENDIX E.

The Federal Employers' Liability Act.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404. 45 U.S. Code, Sec. 51.

APPENDIX F.

Contributory Negligence; Diminution of Damages.

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, Sec. 3, 35 Stat. 66. 45 U. S. Code, Sec. 53.

APPENDIX G.

Assumption of Risks of Employment.

That in any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, Sec. 4, 35 Stat. 66; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404. 45 U. S. Code, Sec. 54.

APPENDIX H.

Actions; Limitations; Concurrent Jurisdiction of Courts.

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States. Apr. 22, 1908, c. 149, Sec. 6, 35 Stat. 66; Apr. 5, 1910, c. 143, Sec. 1, 36 Stat. 291; Mar. 3, 1911, c. 231, Sec. 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, Sec. 2, 53 Stat. 1404; June 25, 1948, c. 646, Sec. 18, 62 Stat. 989. 45 U. S. Code, Sec. 56.

JUL 13 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 143.

BEATRICE A. ANDERSON, as Administratrix of the Estate of CHARLES ARTHUR ANDERSON, JR., deceased,
Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

WILLIAM M. HOWELL,
T. MALCOLM KIRBY,
601 Atlantic National Bank Building,
Jacksonville, Florida,
Counsel for Respondent.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 143.

BEATRICE A. ANDERSON, as Administratrix of the Estate of Charles Arthur Anderson, Jr., deceased,

Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

In this case the Court of Appeals for the Fifth Circuit found that as a matter of law the petitioner's deceased husband was guilty of negligence solely causing his death and that the respondent was free from negligence "contributing in whole, or in part" to such death.

Petitioner seems to take the position that all cases under the Federal Employers Liability Act are for a jury to decide, and that the Court of Appeals erred in deciding the case as a matter of law, but patently such is not the case for, as pointed out in the opinion of the Court of Appeals, "it is still the law, that fact and law are separate provinces, fact for the jury and law for the court".

The Court of Appeals did not depart from any principles of law announced by this Court in rendering its decision.

The facts involved in this case clearly showed that the deceased was solely responsible for his death and that there were no acts of omission or commission on the part of the respondent and its employees which constituted negligence contributing to the accident.

Petitioner argues that the court below erred in failing to consider the question of negligence of the respondent as respects the rolling qualities of the car in question and states that petitioner showed by expert testimony that the car had a defect in its brakes. This feature of the case was disposed of by the jury in finding for the respondent on the first count under the Safety Appliance Act, and such finding was never attacked by petitioner in the proceedings below.

Additonally, the facts showed that when the refrigerator car came to a stop on the crossover switch, all movements ceased, the crew, headed by Conductor Anderson, surveyed the situation, and Conductor Anderson then gave orders to use the chain to pull the car off the switch. At that time no equipment was moving, no dangerous condition existed, and had the crew decided to then cease operations obviously there would have been no accident. However, Conductor Anderson gave orders to get a chain and use it to pull the car and thereby started an entirely new movement and an entirely new chain of events. Even had there been evidence from which a defect in the car could be inferred due to its failure to roll quite as far as expected, still the chain of causation was entirely broken and such incident was entirely unconnected with Conductor Anderson's later decision to use a chain to pull the car.

As stated however, there was no evidence to sustain a finding of a defect in the car and petitioner admitted in her brief (p. 19) to the Court of Appeals that she showed no defect in the track or roadbed.

There was no evidence to sustain a finding of negligence on the part of the engineer in failing to move the engine back in the short few seconds he had or in his failure to blow the whistle or ring a bell.

The engineer's shouted warning to the deceased was given just as soon as the engineer realized that Anderson was persisting in his attempts to unfasten the chain, but by his uncontradicted testimony, he had time only to shout and then Anderson was caught. This was the only warning that time and circumstances permitted. Furthermore, the engineer knew that Anderson was a man of experience and common sense and he had no reason to believe that a warning was necessary. This is particularly true when it is remembered that Anderson made the decision to use the chain, commenced the car rolling and walked into an obvious danger of his own making.

Petitioner argues that the decision of the Court of Appeals is contrary to *Ellis* v. *U. Pac. R. Co.*, 329 U. S. 649, 67 S. Ct. 598, 91 L. Ed. 572, as to the duty to warn. Such is not the case, for the facts in the *Ellis* case, either controverted or uncontroverted, showed that Ellis had little experience and was unfamiliar with the hazards existing before his injury. Here Anderson was entirely familiar with the danger present just as everyone knows the danger of fire. The Court of Appeals was correct in holding that there is no duty to warn of known or obvious dangers and therefore that it is not negligence to fail to so do. 65 C. J. S., Negligence, Sec. 89, Notice or Warning of Known or Obvious Dangers, P. 599; 56 C. J. S., Master

and Servant, Sec. 296, P. 1057; *Foreman* v. *T. & N. O.*, 205 F. 2nd 79.

Common sense dictated that it was an utter impossibility for the engineer to move a steam locomotive and four pulpwood cars backward in the few fleeting seconds he had available to him. What is more important, there was no testimony other than to the effect that it was impossible.

Petitioner urges that the decision of the Court of Appeals is contrary to *Lavender* v. *Kurn*, 327 U. S. 645, 90 L. Ed. 916, 66 S. Ct. 740; *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29, 88 L. Ed. 520, 64 S. Ct. 409 and other similar cases cited. Yet, petitioner nowhere points out what facts existed which could give rise to an inference of negligence on the part of the engineer in failing to sound a warning other than his shouted warning, or in failing to move the engine and pulpwood cars backward. Those cases permit reasonable inferences to be drawn by the jury from the facts, but they do not permit inferences to be drawn where there is a complete lack of evidence from which to so do.

The holding by the Court of Appeals did not depart from, but followed, the well settled law in cases of this sort and it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

William M. Howell,
T. Malcolm Kirby,
Counsel for Respondent.

NOV 1955
HAROLD B. WILLEY, Cl

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 143.

BEATRICE A. ANDERSON, as Administratrix of the Estate of CHARLES ARTHUR ANDERSON, JR., deceased,
Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING AND PETITION FOR REHEARING.

WILLIAM M. HOWELL,
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601 Atlantic National Bank Building,
Jacksonville, Florida,
Counsel for Respondent.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 143.

BEATRICE A. ANDERSON, as Administratrix of the Estate of CHARLES ARTHUR ANDERSON, JR., deceased,

Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING.

Atlantic Coast Line Railroad Company respectfully moves for leave to file this its petition for rehearing of the order of this Court granting certiorari and reversing the judgment of the United States Court of Appeals for the Fifth Circuit entered on October 10, 1955. Rehearing is sought on this order granting certiorari and reversing the judgment below for the reason that substantial grounds for the affirmance of the judgment below exist although not previously presented to this Court.

Conclusion.

For these reasons a rehearing herein is prayed.

Respectfully submitted,

WILLIAM M. HOWELL,
T. MALCOLM KIRBY,
Counsel for Respondent.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58(2) of the rules of this Court.

WILLIAM M. HOWELL,
Counsel for Respondent.

JUL 25 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 261

In the Matter
of

JAMES L. SWAFFORD,

Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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THE FREE PRESS, TAMPA, FLORIDA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. _____

In the Matter
of

JAMES L. SWAFFORD,

Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this cause.

OPINIONS BELOW

The District Court delivered no opinion.

The opinion of the Court of Appeals (R-225) has been reported in 220 F. 2d 901. A copy is appended as Appendix I.

JURISDICTION

The judgment of the Court of Appeals was entered April 8, 1955; and order denying rehearing entered May 16, 1955.

Jurisdiction to issue the writ rests on Title 28, United States Code, Section 1254.

QUESTIONS PRESENTED

I. Did not the Court of Appeals, by determining that the District Court should have directed a verdict, fail to follow the Rules of Decision Act (28 USC §1652), a statute of the State of Florida and the decisions thereunder, its own decisions interpreting that statute, the decisions of this Court, and the decisions of other courts of appeals interpreting similar laws?

Under this general question, there are the following ancillary and more specific questions:

A. Has not the Court of Appeals, by holding that a railroad in Florida is liable for excessive speed (or failure to warn) only if the injured person is himself not negligent, erred in formulating a principle of law which completely disregards the Comparative Negligence Rule imposed by statute (Sect. 768.06, Florida Statutes, 1953)?

B. When, by Florida Statute (Sect. 768.05, Florida Statutes, 1953), a railroad is liable for injury to others unless it shows it "exercised all ordinary and reasonable care and diligence," must not the case go to the jury when there is evidence of excessive speed or other failure to use *all* ordinary and reasonable care?

STATUTES INVOLVED

The following statutes are involved:

Federal Statute:

Title 28 USC §1652:

> "State laws as rules of decision.—The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

Florida Statutes:

Section 768.05 Florida Statutes 1953:

> "Liability of railroad company.—A railroad company shall be liable for any damage done to persons, stock or other property, by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employ and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company."

Section 768.06 Florida Statutes 1953:

> "Comparative negligence.—No person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent, or is caused by his own negligence. If the plaintiff and the agents of the company are both at fault, the former may recover, but the amount of recovery shall be such a proportion of the entire damages sustained, as the defendant's negligence bears to the combined negligence of both the plaintiff and the defendant."

STATEMENT OF THE CASE

This action was brought by petitioner to recover damages for the negligence of respondent in causing the death of petitioner's 42 year old wife and depriving him of her companionship, society and affection. The case was submitted to a jury on the issues of denial of negligence by the respondent railroad and the sole or contributory negligence of the decedent, under a Florida statute imposing the Comparative Negligence Rule (R-1, 4), respondent's motion for directed verdict at the close of all the evidence being denied (R-191). The verdict in the amount of $9,875.00 (R-211), indicated that the jury had found both parties negligent and had apportioned the damages according to the statute, since the proof of damage was greatly in excess of the verdict (R-130-136).

Respondent's Motion To Set Aside Verdict and For Judgment, Or In Alternative For New Trial was based essentially on the grounds that the evidence showed conclusively that plaintiff's negligence was the sole proximate cause and that it showed no negligence on the part of the railroad (R-212). This motion being denied (R-214), respondent appealed on the same grounds (R-216, 219).

The Court of Appeals reversed the judgment of the trial court on the basis that "the trial court erred in refusing to direct a verdict for the defendant," because the death of Mrs. Swafford was found "attributable solely to her own negligence" (R-235). The Court resolved this issue of sole proximate cause by the indirect method of finding that the evidence "failed to show any act of negligence on the part of the employees of the defendant." (R-231, 235). The Petition for Rehearing pointed out that the Court of Appeals had assumed

the truth of respondent's version of conflicting evidence as to Mrs. Swafford's negligence, had also assumed the truth of facts not present in the record, had rejected or ignored evidence of the railroad's negligence upon which it had rendered other decisions to the contrary, and that it had imposed a rule as to negligence of a railroad contrary to Florida statute (R-237). Nevertheless, the Petition for Rehearing was denied, without opinion, on May 16, 1955 (R-251).

The undisputed facts in the record were that petitioner's wife was killed on December 30, 1952 when the automobile she was driving was struck by respondent's train at a street grade crossing at a right angle with the tracks of respondent, which ran parallel to the city limits of Sarasota, Florida, some 200 feet away, and enter the city limits about one-half mile south of the crossing (R. 66). Mrs. Swafford was returning to her home at 5:24 in the afternoon, having taken her maid home, and was traveling west on 27th Street. She passed the usual railroad crossing sign, located 150 feet from the track on the right side of the street, but her view of the train's approach from the north was obstructed by a store building and cabbage palm until she was within 80 feet of the tracks (R. 60, 67, 144, 145, 157). The area on both sides of the track was a thickly populated residential section (R. 26, 28, 64, 65), and the street was a heavily traveled state highway (R. 29, 39, 121-123, 127).

The train approached from the north, traveling at a speed of 63-64 miles per hour (R-147, 161), which was faster than it usually traveled (R. 90, 91, 93, 71, 72), and was increasing its speed at the time of collision with decedent's automobile (R. 98, 99). Although the fireman and engineer both saw decedent's automobile when

the train was about 200 feet from the crossing, and watched the automobile move toward the track from less than 100 feet away at a normal speed (R. 149, 163, 164), the brakes of the train were not applied until after the collision (R. 152, 153, 165). After braking, the train traveled 3,060 feet and was within the city limits of Sarasota when it stopped (R. 62-). The train was running at least half an hour late (R. 106, 161, 169) and struck the car so forcefully that it threw Mrs. Swafford's body through the air to a point 177 feet south of the crossing and left the raised letters of the railroad's emblem imprinted on the steel body of the automobile (R. 10, 11, 43, 44, 46, 65).

BASIS OF FEDERAL JURISDICTION

This action was originally brought in the United States District Court for the Southern District of Florida, Tampa Division, under Title 28, United States Code, Section 1332.

REASONS FOR ALLOWANCE OF WRIT

I. THE COURT OF APPEALS ERRED IN DECIDING THIS CASE UPON A RULE WHICH CONFLICTS WITH APPLICABLE STATE LAW, CONTRARY TO FEDERAL STATUTE AND THE DECISIONS OF THIS COURT—

The Rules of Decision Act (presently incorporated as §1652 of Title 28, USC), requires the federal courts to follow state statutes and decisions in these negligence actions (*Hudson v. Moonier,* 304 US 397, 82 L ed 1422, ; *Mississippi Power & Light Co. v. Whitescarver,* 68 F 2d 928 (CA 5, Miss., 1934).

In the instant case, the Court of Appeals has promulgated a rule which is foreign to Florida law; and which, if uniformly applied, would result in the practical abolition of the Florida Comparative Negligence Statute on railroad accidents (§§ 768.05, 768.06, Florida Statutes, 1953).

This statute has once before been before this Court. In *Stringfellow v. Atlantic Coast Line R. Co.,* 290 US 322, 78 L ed 339, this Court reversed the Court of Appeals for the Fifth Circuit, deciding that the statute required that the jury compare the negligence of both parties, and remanded for a finding on the question of "sole proximate cause." On that remand, the Court of Appeals, having previously found the railroad negligent, sent the whole case to the jury on the ground that—

> "The opinion of the Supreme Court holds that the railroad company has under Florida law no total defense against the homicide of Stringfellow except by proving that in fact he alone and *itself in no degree* caused his injury." (Emphasis supplied).
>
> *Stringfellow v. Atlantic Coast Line R. Co.,* 67 F 2d 1012, 1013.

That ruling, violated in this case, is an accepted statement of the Florida law, and follows substantially *Atlantic Coast Line R. Co. v. Watkins,* 121 So 95 (Fla. 1929), where the Supreme Court of Florida held that the statutory presumption of the railroad's negligence—

> "* * * * is not removed until and when the defendant company has made it to appear that its agents have exercised *all ordinary and reasonable care.*" (Emphasis supplied). (at p. 98).

The precautions necessary to the exercise of reasonable care by the railroad are well established:

(1) The use of warning devices, such as blowing the whistle or horn and ringing the bell;

(2) The use of safety devices, such as the brakes;

(3) The use of reasonable precaution and foresight when approaching a grade crossing; that is, proceeding at a reasonable speed.

The Florida decisions establish that *all* of these precautions must be demonstrated before the railroad can be found to be without fault.

As long ago as 1929, in *Atlantic Coast Line R. Co. v. Watkins,* supra, the Supreme Court of Florida determined that the use of the warning device was not enough:

> "A mere perfunctory blowing of a whistle and ringing of a bell at or near a crossing to give warning of an approaching train where it is being driven under such circumstances and at such speed as to reduce the so-called warning of its approach to its minimum value for the prevention of injury to a traveler on the highway desiring to cross the track of the railroad may not be sufficient to discharge the obligation of the railroad company at such time and place." (at p. 100).

In the Timmons case cited by the court of appeals (*Atlantic Coast Line R. Co. v. Timmons,* 36 So 2d 430), the Florida Supreme Court specifically found that although "all the precautions required of defendant were observed," including blowing the whistle, ringing the bell and *applying the brakes,* it recognized that—

> "A case might arise in which the speed testified to [perhaps above the customary rate of speed] would be excessive, but under the circumstances here, we do not see that it was material."

In urban areas, the factor of lack of "excessive speed" has been an element of a railroad's reasonable care in Florida since 1912.

> "It cannot justly or fairly be said that the defendant could not reasonably have contemplated that the running of a train through a town at an unlawful and, considering the ordinary conditions of human activities in a town, at an excessive rate of speed, would not probably result in an injury of the nature here shown. * * * *
>
> "The jury on supporting evidence, and under not unfair charges, in effect found that the excessive speed and the lack of proper signals were a proximate cause of the injury."
>
> *Director General of Railroads v. Into,* 91 So 269, 271 (Fla. 1912).

These requirements have been followed in all Florida railroad crossing cases, and strengthened by the most recent one decided April 27, 1955 (after the Court of Appeals' opinion in the case at bar), where in *Martin v. Favorato,* 79 So 2d 780, a failure to negative "excessive speed" was fatal to the railroad's defense, even though all warning signals were given *and brakes* were applied:

> "* * * * The vehicle was struck at the rear left wheel, according to witnesses the jury were privileged to believe. If that fact is accepted, then the jury could have deduced that the driver of the truck could have cleared the crossing in the additional

time that would have been available had the train been traveling only twenty-five miles an hour. We think this was definitely a jury question. We cannot decide that the damage was traceable solely to the driver's negligence, or in other words, that the damage would have resulted even had the train been proceeding at the legal rate of speed."

The decision of the court of appeals pronounces a new rule, however. Under its decision, "the *railroad* can measure the care which it exercises both in relation to speed and warning devices on the assumption that members of the general public will act as reasonably careful and prudent persons." But if a member of the general public, as a motorist, should ever fail to act prudently, the court of appeals has in effect stated that the railroad owes no more duty of care to him, than if this human were an animal on the tracks. Applying the new "rule," if the engineer observes that a vehicle is improvidently approaching a crossing, he can blow his whistle, ring his bell,—then full speed ahead and the devil take the hindmost, which is exactly what the train crew did in the instant case.

No such anti-humanitarian doctrine has even been hinted at by the Florida Supreme Court—let alone adopted.

II. THE COURT OF APPEALS HAS DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND THE DECISIONS OF THIS COURT.

This Court has laid down as governing principles that, in deciding whether a verdict should have been directed for the defendant, the reviewing court must assume as established the facts that the plaintiff's evidence reasonably tends to prove and that the court

should draw in his favor all the inferences fairly deducible from those facts. *Lumbra v. United States,* 290 US 551, 78 L. ed. 492, and that appellate courts "are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." *Tennant, Adm'x. v. Peoria & P.U.R. Co.,* 321 U.S. 29, 88 L. ed. 520; *Lavender, Adm'r. v. Kurn,* 327 U.S. 645, 653, 90 L. ed. 916. Yet the Court of Appeals passes over the fact that the engineer watched Mrs. Swafford's car travel toward the tracks from 100 feet away, until he lost sight of it 60 feet away (R. 164), and yet neither he nor the fireman did anything to avoid a collision until after the impact (R. 152, 165), by saying "Any other action would be almost beyond physical and mental capability." But doesn't the jury have the right to find, from the fact that the car was struck on the right rear, that if the train had been slowed even slightly, a collision would have been avoided and that a reasonably prudent man would have taken some action? This same Court of Appeals in *Atlantic Coast Line R. Co. v. Pidd,* 197 F. 2d 153, and in *Lowry v. Seaboard Air Line Ry. Co.,* 171 F. 2d 625, sustained a finding that the engineer was negligent even though there he *did apply* brakes some distance before reaching the crossing.

Certainly, the Court of Appeals is not now justified in overruling a jury and trial judge, who observed the witnesses first-hand, by making its own findings that the evidence of complete indifference to the life of Mrs. Swafford on the part of the engineer and fireman nevertheless "failed to show any act of negligence" (F. 235).

III. THE COURT OF APPEALS' OPINION IS IN CONFLICT WITH ITS OWN DECISIONS AND THOSE OF OTHER COURTS OF APPEALS ON SIMILAR LAW.

We can find no support, neither under Florida law, nor the decisions of other courts concerning similar statutes, for the decision of the court of appeals in this case, that the District Court should not have let the case go to the jury. Uniformly, questions of excessive speed and other elements of railroad-crossing negligence are for the jury, as so concisely stated by the late Mr. Justice Strum of this very Court of Appeals:

> "Even if decedent was negligent, the character of the crossing is to be considered, along with the restricted view toward the south; the fact that decedent was unfamiliar with the crossing while the engineer of the train was thoroughly familiar with it; the fact that the crossing was heavily traveled and that the collision occurred at a heavy traffic hour; whether considering the speed of the train and the restricted view at the crossing, the signals given were reasonably adequate, or whether slower speed or more effectual signals were essential to due care in the circumstances; and whether the engineer was reasonably alert in discovering decedent's peril and in stopping the train. * * *
>
> *Atlantic Coast Line R. Co. v. Pidd, supra—*

The following citations from this Court of Appeals and other Courts of Appeals are pertinent, but not exhaustive:

5th CIRCUIT

Atlantic Coast Line R. Co. v. Joiner, 205 F2d 426 (Fla. 1953) cert. denied 246 US 899, 98 L. Ed. 406.

Atlantic Coast Line R. Co. v. Pidd, 197 F2d 153 (Fla. 1952) cert. denied 344 U. S. 874, 97 L. Ed. 677.

Atlantic Coast Line R. Co. v. Freeman, 193 F2d 217 (Ala. 1952), cert. denied 343 U. S. 935, 96 L. Ed 1343.

Atlantic Coast Line R. Co. v. Hadlock, 180 F2d 105 (Fla. 1950).

Lowry v. Seaboard Air Line R. Co., 171 F2d 625 (Fla. 1948).

Smith v. Atlantic Coast Line R. Co., 127 F2d 798 (Fla. 1942).

Powell v. Westermann, 94 F2d 203 (Fla. 1938).

Atlantic Coast Line R. Co. v. McKinley, 84 F2d 33 (Fla. 1936).

8th CIRCUIT

Roth v. Swanson, 145 F2d 262 (Minn. 1944).

10th CIRCUIT

Chicago & N. W. Ry. Co. v. Golay, 155 F. 2d 842 (Wyo. 1946).

The uncontradicted evidence of a train speed of rom 63 to 65 miles per hour (or 93 feet per second) hen approaching a heavily traveled grade crossing ith obstructions limiting visibility to 80 feet of tracks, ss than 200 feet from the city limits of Sarasota, lorida (1950 population, 18,896), is practically a dem- nstration of negligence per se. When there is added he fact that the only precautions taken against the ccident by the agents of the railroad were ringing a ell and sounding a horn, presumably not unlike a bus orn (R. 158-159), it is indeed strange law that would eep such a case from the jury.

CONCLUSION

On the question of negligence of the railroad being an issue for the jury under circumstances supported by the evidence in this case, there is no basis for a distinction between the case at bar and the prior decisions of the Court of Appeals cited herein. Not only has the Court of Appeals assumed as true facts that do not appear in the record, but it has rejected facts in the record, upon which the jury found the railroad negligent in failing to take action to avoid the accident and in traveling too fast, and has substituted its own findings on the record and indicated that a railroad company can only be liable if the motorist is himself proceeding in a lawful manner.

It is prayed, therefore, that this Court exercise its power of supervision and reinstate the verdict of the jury and the judgment of the lower court, thereby restoring to James L. Swafford the small monetary compensation that he was awarded, even though it can never fill the great void that the death of his wife must have left in his life.

Respectfully submitted,

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OPINION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT
FILED—APRIL 8, 1955

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 15121

ATLANTIC COAST LINE RAILROAD COMPANY
Appellant,

VERSUS

JAMES L. SWAFFORD,
Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(April 8, 1955.)

Before HUTCHESON, Chief Judge, TUTTLE, Circuit Judge, and DAWKINS, District Judge.

TUTTLE, Circuit Judge: This is an appeal in a railroad grade crossing case, tried to a jury, with verdict for plaintiff below.

Mrs. James L. Swafford, a 42 year old housewife and rest home operator, for whose death the husband brought the action, was driving a car west on 27th Street outside of Sarasota, Florida, at 5:24 P.M. on December 31, 1952, a clear day. She was returning to her home, some distance from the scene of the accident,

after having taken her maid home a few blocks from the crossing in question. She had crossed the railroad on the same street, going in the opposite direction, just a few minutes earlier, and, according to the testimony of the maid, she "slowed up for the railroad crossing." As Mrs. Swafford approached the track on her fateful return trip, she passed a typical railroad stop sign with the words "Stop. Fla. Law. R.R. Crossing, Atlantic Coast Line," and bearing crossed lines in the form of the letter X across the sign from top to bottom. This sign was off the road to the right and the bottom of the sign was about seven or eight feet from the ground. This sign was 150 feet from the railroad track. Immediately beyond the sign, and on the right side of the road, was a one-story store building which blocked the view of the tracks to the right (north) side of the road. The crossing is plainly apparent from the point where the sign post is located, because the tracks are exposed on both sides of the crown of the road or street on which Mrs. Swafford was driving. Next to the building was a bushy-topped plant, known as a cabbage palm, which also blocked the view to the north. The palm was 80 feet east of the tracks. Upon passing the palm an unobstructed view up the tracks for a long distance was opened up.

When the train, approaching from the north (right side of the automobile) was 200 feet from 27th Street, the engineer and fireman both saw the automobile approaching the crossing from behind the cabbage palm at "a normal speed." The automobile slowed down and both trainmen thought the driver was stopping. There was no expert or other testimony to the effect that Mrs. Swafford was unable to stop when her car was first seen to slow down. Thereafter, after the view of the car was lost to the engineer sitting on the right hand side of the

cab, but in plain view of the fireman, the automobile picked up speed and ran in front of the locomotive. The train was traveling between 60 and 65 miles an hour. The automatic bell was ringing and the horn or whistle had been blowing for some 1500 to 1700 feet. The graph that was maintained on the locomotive to show the speed at all times indicated a speed of 63 miles per hour, and that it was on an accelerating curve at the moment of impact. The engineer first knew of the accident when the impact occurred and he then made a heavy service application of the brakes, which he explained as being proper under the circumstances with seven passenger cars, rather than an emergency application, after the collision had occurred. The car was demolished and Mrs. Swafford was killed, her body being thrown some 166 feet ahead of and to the right of the train.

The tracks of the defendant railroad parallel the city limit line, 200 feet to the west, for some distance north of 27th Street, and they enter the city limits approximately a half mile south of the 27th Street crossing. It was testified that traffic density on 27th Street several blocks to the west averaged 150 vehicles an hour some nine months after the accident, and that traffic conditions were substantially the same as at the time of the accident. There was other testimony that the street, which was a 19-foot surfaced roadway without sidewalks, was much traveled and that the area, while semi-rural, was well populated. Pictures submitted to the jury and brought before us as a part of the record, show that a train crew approaching this crossing was looking down a right-of-way 130 feet wide on level ground with no houses apparent on either side of the single-track road closer than 100 feet. 27th Street was the only railroad crossing within a half mile in either direction.

Upon the submission of the case to the jury a verdict for $9,875.00 was found for the plaintiff below. In submitting it to the jury the court overruled appellant's motion for directed verdict. After judgment appellant moved that the verdict be set aside and that verdict be directed for it or, in the alternative, that a new trial be granted because of alleged error in the admission by the court of certain evidence.

The rules of negligence to be applied in this case are, of course, those enunciated by the Supreme Court of Florida in railroad injury cases.[1]

Appellee relies with assurance on the case of *Atlantic Coast Line R.R. Co. v. Pidd,* 5th Cir., 197 F. 2d 153, in which this court, in a railroad crossing case in many ways similar to the case at bar, declined to hold that the trial court erred in submitting the issue of the railroad's negligence to the jury. In an earlier case, which superficially appears to have involved many of the same circumstances, this court reversed the judgment of the trial court for not submitting the question of the railroad's negligence to the jury. *Lowry v. Seaboard Airline R.R. Co.,* 5th Cir., 171 F. 2d 625. In those two cases, both of which concerned Florida accidents, the court held that the negligence of the decedent was not so clearly the sole proximate cause of his injury as to make immaterial the negligence, if any, of the company.

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1 The Florida statute involved is found in §768.06 Florida Statutes 1951, F.S.A., which reads as follows:

"No person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent, or is caused by his own negligence. If the plaintiff and the agents of the company are both at fault, the former may recover, but the amount of recovery shall be such a proportion of the entire damages sustained, as the defendant's negligence bears to the combined negligence of both the plaintiff and the defendant."

Since the rule to be applied is a Florida rule, we have undertaken to find a statement of the underlying principles from the most recently decided Florida cases. We, therefore, quote from *Martin v. Rivers,* 72 So. 2d. 789. The court in the Rivers case quoted at length from *Atlantic Coast Line R.R. Co. v. Timmons,* 36 So. 2d 430, 431.[2] In undertaking to apply the legal principles as announced by the Florida Supreme Court to the facts

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2 This quotation approved so recently follows:

"* * * The railroad has a right to assume that one crossing its tracks will at least look to see if there is an approaching train, and if so, he will not plunge into its pathway. Apellee did not observe that precaution. From the time he entered the right of way, he had a clear unobstructed view for over 4000 feet in the direction of the train and had nothing to do but lift his eyes in that direction. If he had taken the slightest precaution to look or listen he could have avoided the accident.

"The standard of prudence that one must observe in approaching a grade crossing is not uniform. Some jurisdictions require that one stop, look and listen, regardless of how clear the track is in either direction. Other courts require the traveler to look and listen, the duty to stop, depending on the circumstances revealed by looking and listening. Pokora v. Wabash Ry. Co., 292 U.S. 98, 54 S. Ct. 580, 78 L.Ed. 1149, 91 A.L.R. 1049; Baltimore & Ohio R. Co. v. Goodman, 275 U.S. 66, 48 S. Ct. 24, 72 L.Ed. 167, 56 A.L.R. 645. We approve the latter rule in this State and when, as here, it is conclusively shown that the plaintiff did not look or listen, that there was no obstruction whatever to the vision, that the accident took place in a rural community where looking or listening would have avoided it, he is guilty of negligence which was the sole proximate cause of his injury and cannot recover.

"* * * It is clear, however, that appellee neglected to observe the most elementary duty imposed on him to preserve his safety. He was on notice that he was approaching a place of danger and must look out for the train lest he suffer the consequences. He failed in this, and in doing so, was the sole cause of the accident."

Having repeated the law applicable in such cases by reference to the Timmons case, the Florida Supreme Court then said:

"The fireman had the right, from the facts in the record here, to believe that the deceased was in possession of his faculties and his normal senses, and that with all of the signals of danger, the extent of which were almost overwhelming, he would not walk directly into the path of a moving train. When the fireman finally realized that the deceased was not going to stop and was not going to heed every danger signal possible to give, it was too late for any human agency to extricate the deceased from the situation that he placed himself in or prevent the death which so unfortunately occurred."

in the instant case, we are faced initially with th unquestioned proposition that the decedent was herse guilty of negligence. This is clear from the fact tha Mrs. Swafford had just previously crossed this railroa track, which was marked by the usual railroad mark ing signs, and had slowed down before doing so; tha on the return trip she approached the tracks, whic were not only marked by the railroad sign but whic were clearly apparent to anyone driving west on 27t Street from at least as far away as the warning sig She proceeded towards the tracks when the train wa approaching the crossing with its whistle blowing an its bell ringing in such manner that it was heard b all of the several witnesses who testified they were i the vicinity of the accident. She approached at "nor mal" speed and slowed down when she was at a poin where she could clearly see the train approaching fro her right. The only evidence on the point is to the effe that the locomotive engineer lost sight of her car at time when it was still slowing down and that at tha point the train was about 60 feet north of the crossing Both engineer and fireman and a third witness testifie without dispute, that after slowing down her automo bile darted ahead by increasing its speed and thus ra onto the track immediately in front of the locomotiv

The foregoing analysis of the situation at the tim of impact, it seems to us, points out the essential di tinctions between this case and the *Atlantic Coast Lin R.R. Co. v. Pidd, supra,* and *Lowry v. Seaboard Airlin R.R. Co., supra.*

In the Pidd case the decedent applied the brake to her automobile at about the point where she coul first see the approaching train. Skid marks on the roa showed that her effort to stop continued until the ca

came to a stop directly in the path of the train. Moreover, the evidence showed she was not familiar with the crossing. In the Lowry case the accident happened on a city street within the city limits of Jacksonville, Florida, where all city traffic, including city busses, regularly crossed the track and where, as was testified to by the defendant's fireman, automobiles occasionally stopped behind busses, halted for the track, but occasionally passed around the bus apparently thinking the bus had stopped for taking on passengers. Such a bus was stopped at the tracks in the Lowry case. There was the further circumstance that there was considerable dispute as to the adequacy of the sounding of the whistle on the occasion in question. This added up to the fact "that she did not necessarily proceed recklessly into an evident danger, so as to make her negligence the sole proximate cause of her injury."

We believe that there can be no dispute but that in the case at bar Mrs. Swafford was herself seriously and gravely negligent.

The next question is whether decedent's negligence was the sole proximate cause of her death. Apellant strongly argues in its brief that for us to affirm the decision of the court below would be tantamount to holding that speed of 60 to 65 miles per hour is per se sufficient evidence of negligence to sustain a jury's verdict. While we do not agree with this conclusion, we find it impossible to isolate any act of omission or commission by defendant's servants in the operation of the train from which the jury could infer negligence having a causal connection with the injury to Mrs. Swafford. We find for instance in the Timmons case, *supra,* the following statement, which is taken from the quotation in footnote 2:

> "* * * The railroad has a right to assume that one crossing its tracks will at least look to see if there is an approaching train, and if so, he will not plunge into its pathway. Appellee did not observe that precaution. From the time he entered the right of way, he had a clear unobstructed view of over 4000 feet in the direction of the train and had nothing to do but lift his eyes in that direction. If he had taken the slightest precaution to look or listen he could have avoided the accident."

It is significant to note that in the court's statement of the facts of the Timmons case, the court made the following statement:

> "The collision took place at Raiford, a rural community, about eleven A.M., January 21, 1947, in clear day light where the right of way was one hundred feet wide and straight and devoid of obstructions to vision. The evidence shows that the train was moving fast and perhaps above the customary rate of speed. But the bell was ringing, the whistle was blowing constantly, the brakes were applied and all the precautions required of defendant were observed. Timmons was familiar with the crossing, passed over it every day and testified that he paid no attention as he approached it. A case might arise in which the speed testified to would be excessive, but under the circumstances here, we do not see that it was material."

It is to be noted that the right-of-way in the Timmons case was 100 feet wide. Nothing is said as to the nature of the surrounding country except that the collision took place at Raiford, a rural community. As stated in the recitation of facts in this case, the railroad right-of-way was 130 feet wide and no obstructions of any kind were visible to the engineer or fireman for as much as 80 feet to either side of the single track. Moreover, although the crossing in question is called "27th

Street" it is undisputed that only one out of approximately ten such "streets" crossed the tracks. This was the only crossing within a half mile in each direction.

Appellee stresses the fact that the engine crew did not apply the brakes until the accident occurred. An analysis of the speed of the train and the suddenness with which the decedent's car resumed its forward approach to the track indicates that any other action would be almost beyond physical and mental capability. The train was 200 feet from the crossing at the time Mrs. Swafford's automobile was seen 80 feet from it. At 63 miles an hour, the train was traveling 92½ feet per second, which means that whatever happened between the time the engineer and fireman first saw Mrs. Swafford's car and the collision would have to be done in less than 2½ seconds. During more than half of that time Mrs. Swafford was giving every indication of coming to a stop and thus making unnecessary any further action by the train crew. The engineer testified that this was the state of affairs when he lost sight of the car when the engine was 60 feet from the crossing. It would be obviously impossible for the fireman to have reacted and passed word to the engineer and for him to have applied the brakes within the fraction of a second remaining before the engine reached the crossing and struck the car. Mrs. Swafford, therefore, it seems to us, was strictly in the position of the appellee in the Rivers case, *supra,* in which the court said "It is clear, however, that appellee neglected to observe the most elementary duty imposed on him to preserve his safety. He was on notice that he was approaching a place of danger and must look out for the train lest he suffer the consequences. He failed in this, and in doing so, was the sole cause of the accident."

Appellee makes much of the speed of the train at the time of the accident. On the other hand appellant vigorously contends that speed cannot of itself constitute negligence. It seems to us that the statement by Judge Strum in *Atlantic Coast Line R.R. Co. v. Pidd, supra,* covers this point adequately: "A railroad company cannot regulate or remove obstructions which are off its right of way but it can, and should, regulate the speed of its trains, and the signals of their approach at crossings, so as to give reasonably adequate warning in the circumstances to a traveler *who is exercising reasonable care for his own safety. Atlantic Coast Line R.R. Co. v. Weir,* 63 Fla. 69, 58 So. 641, 41 L.R.A. N.S. 307." (Emphasis supplied.)

As we understand this principle, it is the duty of the railroad company not to permit its trains to travel at a speed which, when maintained in connection with adequate warning devices, would endanger a pedestrian or automobile driver who is himself not negligent. In other words, the railroad can measure the care which it exercises both in relation to speed and warning devices on the assumption that members of the general public will act as reasonably careful and prudent persons. The degree of care which is required of the railroad should, therefore, not be increased by reason of the failure of members of the public to exercise reasonable care for their own safety. Measured by these standards, we think it clear that the plaintiff below failed to show any act of negligence on the part of the employees of the defendant.

It being clear under the Florida law that the accident, resulting in the death of Mrs. Swafford, was attributable solely to her own negligence, the trial court erred in refusing to direct a verdict for the defendant.

The judgment is REVERSED with directions to enter a judgment for the defendant.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Fifth Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1955

NO. 261

JAMES L. SWAFFORD
Petitioner

vs.

ATLANTIC COAST LINE RAILROAD COMPANY
Respondent

ON PETITION FOR WRIT OF CERTIORARI FROM THE COURT OF APPEALS, FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The Court of Appeals reversed the judgment of the trial court on the ground that there was a complete absence of any showing of negligence on the part of the respondent Railroad, the record disclosing that the accident and death were occasioned solely by the negligence of the petitioner's deceased wife.

Petitioner makes only a partial and biased statement of the case. The opinion of the Court of Appeals gives a very clear, minute statement of the facts, which

is borne out by the record.[1] There is no dispute as to the condition of the crossing involved or its approach. The approach was not only marked with the usual railroad marking signs but the tracks themselves were clearly apparent to any one traveling in the direction in which the decedent approached. The right of way was 30 feet and there were no obstructions on it.[2] When 80 feet from the track the decedent had a clear view all the way down the track (R 67, 144, 145 and 157).

Mrs. Swafford had just previously passed over this crossing and had slowed down before doing so and was familiar with it. (R 111). As she approached the tracks on the trip in question she was traveling at a normal speed and slowed down when she was at a point where she could clearly see the train approaching from her right. Both engineer and fireman and a disinterested witness testified without dispute that after slowing down, her automobile darted ahead in front of the oncoming train, which was then entering the crossing, too late for the train crew to avoid the collision (R 150, 151, 164, 165 and 175).

Both the engineer and fireman in charge of the engine observed the decedent's automobile approach the crossing and saw it slow down as if to stop. The fire-

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1 220 F 2d, 901. See copy in Appendix to Petition for Writ of Certiorari.

2 See Defendant's Exhibits A, B, C, taken on December 31, 1952, the date following the accident (R-137), as identified by Appellee's witness Hardeson, (R-33) and Plaintiff's Exhibits 5 and 6, (identified R-16, 17) and received (R-19), as well as survey of the area by Plaintiff's Exhibit 14, identified (R-52 to 68), received (R-54). The crossing was clearly marked by standard railroad white flat board sign on Mrs. Swafford's approach and over 150 feet from crossing.
The road and track intersected at nearly right angles.

man continued to observe the automobile decreasing speed until the train was within 30 feet of the crossing, when it suddenly accelerated onto the tracks. Although the automobile became lost to the engineer's view when it was approximately 60 feet from the crossing and the engineer was unaware of the imminence of a collision he instinctively made a heavy service application of the brakes a second or so after the impact occurred. At the time it became apparent that Mrs. Swafford was not going to stop and accelerated it was then too late for any human or mechanical force to avoid the collision (R. 150, 151, 164 and 165).

All the witnesses to the accident testified that adequate and timely warning of the approach of the train was given. The train horn was blown loudly, clearly and continuously approximately 1700 feet or more before reaching the crossing with the bell on the train ringing automatically throughout the same distance (R 71, 86, 90, 94, 138, 139, 143, 145, 148, 149, 154, 155, 161, 162, 173, 174). The accident took place on a clear afternoon at 5:24 P. M. (R 9, 161).

It was on these facts that the lower appellate court concluded that the respondent Railroad was guilty of no negligence and that the collision was caused through the sole negligence of the decedent.

ARGUMENT

As we view it, the sole question presented is:

Has the petitioner clearly demonstrated that the Court of Appeals decided an important question of Florida law in a manner in conflict with the decisions of the Supreme Court of Florida?

Petitioner, as in the court below, relies heavily upon the cases of *Atlantic Coast Line R. R. v. Pidd,* 196 F 2d, 163, and *Lowry v. Seaboard Air Line R. R. Co.* 171 F 2d, 625, both being decisions of the lower appellate court, and as the basis for writ of certiorari, attempts to assert that the lower court failed to follow these decisions. First, the conflict with these decisions is immaterial since the Court of Appeals was governed by and duty-bound to follow, as it rightfully did, the controlling Florida cases. *Erie R. Co. v. Tompkins,* 58 S Ct. 817, 304 U. S. 64. Second, it is clear from the opinion rendered below that the lower court was cognizant of its own decisions but found them inapplicable, saying:

> "The foregoing analysis of the situation at the time of impact, it seems to us, points out the essential distinctions between this case and the Atlantic Coast Line RR Co. v. Pidd, supra, and Lowry v. Seaboard Air Line R. R. Co., Supra." (See Petition — Appendix, page 5).

That the Court of Appeals adhered to and followed the controlling law of Florida is evident. After reciting facts the lower court stated:

> "Since the rule to be applied is a Florida rule, we have undertaken to find a statement of the underlying principles from the most recently decided Florida cases. We, therefore, quote from Martin v. Rivers, 72 So. 2d, 789. The court in the Rivers case quoted at length from Atlantic Coast Line Railroad Co. v. Timmons, 36 So. 2d, 430, 431."

and then after a detailed consideration of these principles as applied to the facts, concluded:

> "It being clear under the Florida law that the accident, resulting in the death of Mrs. Swafford, was attributable solely to her own negligence, the trial

court erred in refusing to direct a verdict for the defendant."

Petitioner's major contention appears to be that under the comparative negligence doctrine in Florida every railroad crossing accident case must be submitted to the jury and the appellate courts have no jurisdiction to review the evidence for the purpose of setting aside an adverse judgment when not supported by any showing of negligence on the part of the Railroad. This argument is clearly answered by the decisions of the Supreme Court of Florida, i. e. *St. Louis-San Francisco Railroad Company v. Earl,* 49 So. 2d. 325 (1951) where the court, after reviewing the evidence, held:

"The trial court was accordingly in error for refusing to direct a verdict for defendant and grant a new trial. His judgment is accordingly reversed.

To the same effect see:

Loftin v. Bryan, 63 S 2d, 310 (1953)

Loftin v. Kibica, 68 S 2d 390 (1953)

Martin v. Rivers, 72 S 2d 789 (1954)

Atlantic Coast Line R. R. Co. v. Hill, 76 S 2d, 861 (1955)

These current decisions clearly indicate notwithstanding the comparative negligence rule that the Supreme Court of Florida in each instance did not hesitate to examine the evidence and find it wanting to support the adverse verdict rendered by the jury.

For the latest accord decision of the Florida Supreme Court see Loftin, et al. v. Nolin, 81 S 2d (Adv. Sheet) 200, decided June 15, 1955.

Under the law of Florida it is clear that no duty devolved upon those in charge of the operation of the locomotive to slow down or stop unless and until they realized that the driver of a motor vehicle cannot or will not keep off the tracks in front of the approaching train and avoid the danger of collision therewith. See

A. C. L. v. Miller, 53 Fla. 246, 44 So. 247

S. A. L. R. R. Co. v. Tomberlin, 70 Fla. 435, 70 So. 437

L & N R. R. Co. v. Harrison, 78 Fla. 381, 83 So. 89.

Dina v. S. A. L. R. R. Co., 90 Fla. 558, 106 So. 416

Foster v. St. Louis San Francisco Ry. Co. 75 F. Supp. 809, and others,

In *A. C. L. R. R. Co. v. Timmons,* 160 Fla. 754, 36 So. 2d, 430, Justice Terrell tersely summed up the whole body of the Florida law on this subject, viz:

> "The standard of prudence that one must observe in approaching a grade crossing is not uniform. Some jurisdictions require that one stop, look and listen, regardless of how clear the track is in either direction. Other courts require the traveler to look and listen, the duty to stop, depending on the circumstances revealed by looking and listening. Pekora v. Wabash Ry. Co., 292 U. S. 98, 54 S. Ct. 580, 78 L. Ed. 1149, 91 A. L. R. 1049; Baltimore and Ohio R. Co. v. Goodman, 275 U. S. 66, 48 S. Ct. 24, 72 L. Ed. 167, 56 A. L. R. 645. We approve the latter rule in this State and when, as here, it is conclusively shown that the plaintiff did not look or listen, that there was no obstruction whatever to the vision, that the accident took place in a rural community where looking or listening would have

> avoided it, he is guilty of negligence which was the sole proximate cause of his injury and cannot recover."

which pronouncement was but the natural climax to cases like *Seaboard Air Line Railway Co. v. Myrick,* 91 Fla. 918, 109 So. 193; *Atlantic Coast Line Railroad Co. v. Miller,* supra; *Seaboard Air Line Ry. Co. v. Smith,* 53 Fla. 375, 43 So. 235; *Seaboard Air Line R. Co. v. Tomberlin,* supra; *Powell v. Gary,* 146 Fla. 334, 200 So. 854; *Garmak v. Florida East Coast Ry. Co.,* 95 Fla. 991, 117 So. 391; *Florida East Coast Ry. Co. v. Davis,* 96 Fla. 171, 117 So. 842; *Atlantic Coast Line R. Co. v. Watkins,* 97 Fla. 362, 121 So. 95; *Covington v. Seaboard Air Line Ry. Co.,* 99 Fla. 1102, 128 So. 426; *Bagdad Land & Lumber Co. v. Boyette,* 104 Fla. 699, 140 So. 798; *Powell v. Jackson Grain Co.,* 134 Fla. 596, 184 So. 492.

Petitioner lays great stress on the fact that the engine crew did not apply brakes until the accident occurred. As shown by the uncontroverted evidence, the decedent's car gave every appearance of stopping and yielding the right of way to the approaching train and it was only when she suddenly resumed her forward speed that any indication of a collision was given, then it was physically impossible for the crew to have taken any action to avoid the collision since at that time the train was less than a second away from the crossing. As the lower appellate court has previously recognized in *A. C. L. R. R. Co. v. King,* 196 F. 2d, 999:

> "If appellee's view that an engineer must apply the brakes as soon as he sees an automobile approaching a crossing, should prevail in law, trains could not run on schedule, or over crossings at more than a snail's pace. This is not the law."

Next, petitioner cites the speed of the train (63 to 65 miles per hour) as a ground for reversing the lower court; however, it is held that speed alone is not negligence. See 44 Am. Jur., page 751, Railroads, Section 511; *Consumers Lumber & Veneer Co. v. A. C. L. R. R. CO.*, 117 F. 2d, 329; *Powell v. Gary*. 200 So. 854, 146 Fla. 334; *A. C. L. R. R. CO. v. Timmons*, supra.

The appellate court clearly held that the death of Mrs. Swafford was attributable solely to her own negligence and the respondent was guilty of no negligence, basing its ruling on the Florida Supreme Court decisions including *A. C. L. R. R. CO. v. Timmons*, supra, and *Martin v. Rivers*, 72 So. 2d, 789.

CONCLUSION

The holding of the Court of Appeals did not depart from but followed the well settled law governing the issues here involved, and we respectfully submit that the petition for writ of certiorari should be in all respects denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM 1955

No. 261

JAMES L. SWAFFORD
Petitioner

vs.

ATLANTIC COAST LINE RAILROAD COMPANY
Respondent

RESPONDENT'S PETITION FOR RE-HEARING ON GRANTING [illegible] CERTIORARI FROM THE COURT OF APPEALS, FIFTH CIRCUIT AND REVERSING JUDGMENT

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TEXT

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IN THE

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OCTOBER TERM 1955

No. 261

JAMES L. SWAFFORD

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vs.

ATLANTIC COAST LINE RAILROAD COMPANY

Respondent

RESPONDENT'S PETITION FOR RE-HEARING ON GRANTING WRIT OF CERTIORARI FROM THE COURT OF APPEALS, FIFTH CIRCUIT AND REVERSING JUDGMENT

PETITION FOR REHEARING

The Respondent, Atlantic Coast Line Railroad Company, being aggrieved by Order of this Court dated October 10, 1955, in appendix, granting Certiorari and reversing judgment of the United States Court of Appeals for the Fifth Circuit, files its petition for rehearing, and as grounds therefor asserts that the decision of this Court reversing judgment of said Court of Appeals:

(a) Is contrary to and in irreconcilable conflict with the decisions, both prior and subsequent to the decision of said Court of Appeals, of the Supreme Court of the State of Florida and the laws and statutes of said

State, which, under the doctrine and decision of *Erie Railroad v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, are the controlling laws of this case;

(b) Is in conflict with previous decisions of said Court of Appeals and of this Court;

(c) Assumes, incorrectly, that the questions propounded by the Petitioner are based upon and borne out by the evidence in the cause, whereas same are misleading and inaccurate;

(d) Is a decision on the merits of said cause without having afforded the respondent an opportunity to be heard thereon, to present the facts of the case, or to have its day in Court, contrary to all rules and common justice;

(e) Creates a different set of standards as to substantive law of Florida in the federal courts of Florida than in the state courts of said State.

ARGUMENT

The opinion of the Court of Appeals (R-225) conformed to and followed completely the state statutes and decisions. It does not relieve the railroad of liability for its negligence, even where accompanied by contributory negligence of the claimant, but holds that where there is no negligence on the part of the railroad, it not being an insurer, it cannot be held liable for the sole negligence of the plaintiff.

As the Court of Appeals' opinion stated:

> "It being clear under the Florida law that the accident, resulting in the death of Mrs. Swafford, was attributable solely to her own negligence, the trial court erred in refusing to direct a verdict for the defendant." (Petition for Writ. App. 10).

The Florida Court has spoken in support of the Railroad's contention in this case a number of times. Looking at the cases in chronological order, we refer the Court first to *Florida East Coast Ry. Co. v. Davis* (1928) 117 So. 842, 96 Fla. 171, followed in (1930) by *Relda Aparts. Inc. v. Atlantic Ins. Co.*, 129 So. 888, 100 Fla. 753, wherein the Court stated that damages cannot be recovered against railroad where the injury was caused by negligence of the injured party in approaching grade crossings without looking for approaching train.

Florida East Coast Railway Co. v. Townsend, (1932) 104 Fla. 362, 140 So. 196, deals with an obstructed crossing. In that case the defendant was charged with carelessly and negligently running a train against an automobile operated by Mr. Townsend over a public crossing about one-half mile south of the village of Orange Mills. The plaintiff recovered a judgment awarding $18,000 damages, and the defendant appealed. It appeared in the case that at about 4:30 or 5:00 p.m., the automobile in which plaintiff and a companion were riding approached the railroad crossing at a point where bushes, more or less, obstructed the view of the railroad track if not also a view of an approaching train.

The court in its opinion held that it was the duty of plaintiffs at least to attentively and cautiously look and listen for trains and to have the automobile under full control at appropriate speed as the known and obvious railroad track was approached. It was held that plaintiff was negligent as a matter of law and that the alleged negligence of the railroad was not clearly established; therefore, the court reversed the judgment for plaintiff for a new trial. The Court pointed out that there was substantial evidence that due warning was not given by whistle and bell of the approaching train. We

submit that a fair inference from the court's language in the *Townsend* case is that proof of due and adequate warning of the approach of the train would have required outright reversal of the plaintiff's judgment.

The case of *Anderson v. Crawford,* (1933) 111 Fla. 381, 149 So. 656, turned upon the admissibility of a local ordinance which had not been alleged in plaintiff's complaint but which had in fact been violated by defendant's engineer; however, in the body of the opinion we find the following language:

> "* * * It is true that, if the plaintiff saw the approaching train, or by the exercise of due care could have seen it as it approached, but in careless disregard of his own life drove his automobile upon the track in front of the train, he should not be allowed to recover damages for injuries sustained."

Although the language quoted in the *Anderson* case cannot be considered an actual holding by the Court, it is of value in that it indicates that the Court continued firm in the proposition that motorists who dash headlong in front of railroad trains are solely responsible for their own injuries and are precluded from recovery of damages from the railroad.

Powell v. Gary, (1941) 146 Fla. 334, 200 So. 854, is an *a fortiori* case in every respect and we contend that the enunciations of the Florida Court in that case are controlling and require outright affirmance of the Court of Appeals in the case at bar. The *Powell* case had to do with damages claimed to have resulted from a collision between a train and the plaintiff's truck on a crossing in the village of Oak, Florida. There was a verdict and judgment for plaintiff and the railroad appealed.

The railroad's testimony in the *Powell* case as to the speed of the train was that it was running 60 miles per hour. One witness for plaintiff estimated the train's speed at 80 miles per hour. Dealing first with warning signals, the Court pointed out that several witnesses for the railroad testified affirmatively and positively that warning blasts of the whistle were given and also that the engine bell was ringing. The Court further pointed out that the testimony of plaintiff's witnesses was entirely negative—that they did not hear the whistle blowing or the bell ringing. The Court quoted from *Seaboard Air Line R. Co. v. Myrick,* (1926) 91 Fla. 918, 109 So. 193, 195, to the effect that it is not sufficient for the injured plaintiff to say that he "did not see" the approaching train nor hear any whistle or bell or noise of its approach in order to overcome positive testimony that all ordinary warnings were in fact given of the train's approach. The opinion then states that the jury should not have arbitrarily disregarded the railroad's evidence with respect to signals and place the blame for injury on the railroad, especially in view of the strong evidence of the negligence of plaintiff's truck driver.

The Court held in the *Powell* case that it was as much the driver's duty to ascertain if a train was approaching from the south as it was the duty of the railroad company to cause warnings by appropriate signals to be given of an approaching train operated by it. The Court also stated that the evidence showed that the railroad company had in fact given warning signals as the train approached the crossing. From that point, the Court went on to hold that the accident was caused solely by the driver's negligence and that there could be no recovery. The pertinent language from the opinion reads:

"* * * It also is apparent from the driver's testimony that he failed to exercise ordinary care and prudence to ascertain whether or not a train was approaching before driving his truck upon the railroad track, and that he could have seen the train if he had looked. If the damage alleged was proximately caused solely by the negligence of the plaintiff or his agent driving the truck, there can be no recovery. The mere rapid speed of the train would not alter this well-settled rule of law. See Atlantic Coast Line R. Co. v. Gornto, 89 Fla. 97, 103 So. 117; Covington v. Seaboard Air Line R. Co., supra; Powell v. Jackson Grain Co., supra. See also notes in 56 A. L. R. 647."

The Court reversed the judgment in *Powell v. Gary, supra,* dealing with evidence of speed of 60 to 80 miles per hour through a village.

In the instant case, *every* witness to the accident testified that adequate and timely warning of the approach of the train to the unobstructed crossing was given.

The Petitioner (plaintiff below) produced two witnesses to the accident. The first, John Arthur Johnson (R-71) said he heard the train blowing and looked up. The second, Arthur Douglas, (R-86) testified that he looked up when the "train blowed" . . . "along in there by the water tank" (R-90); that the horn on the train was the first thing he heard (R-93), it was blowing *loud* and *steady* and blowing all the distance from the water tank (a distance of 1700-1800 feet from the crossing (R-149, 155)) to the crossing where the accident happened (R-93, 94).

Petitioner did not produce any other witnesses to the accident. The Petitioner did not even produce any negative testimony.

Respondent Railroad produced the following witnesses, each of whom testified positively that the horn on the train was blown, loudly and steadily, as it approached the crossing:

1. Eddie Green (R-138, 139), who was standing with Arthur Douglas, appellee's witness, supra.

2. Eddie Alexander (R-143, 145), who was about 80 to 100 feet west of the crossing, in his house and heard the whistle blowing for some time.

3. John McKeever (R-173, 174) who was south of the crossing hunting rabbits, when he heard the train blowing, looked up beyond the crossing and saw the train back by the water tank (1700-1800 feet from the crossing (R-149, 155)), and heard it continue to blow right on up to the crossing.

4. Clinton C. Hamil, fireman on train, (R-148, 149, 154, 155) who testified that both the horn and bell were blown for crossing, beginning *before* train reached whistle post, 1500 feet west of the crossing and spaced throughout that distance on up to the crossing.

5. J. M. Watkins, engineer of train, (R-161, 162, 163), who testified the horn on the train was blown by him for over 1500 feet and up to the crossing, with the bell on the train ringing automatically throughout the same distance.

Thus, the *undisputed* evidence is that, the horn on the train was blown loudly, clearly and continuously for approximately 1700 feet or more approaching this crossing on a straight, level track.

There was no dispute on the condition of this crossing or its approach.* The deceased wife had a clear view of the crossing and of the approaching train *when she was 80 feet from the tracks.* On the wife's right (from which the train approached) she passed a store, a cabbage palm next to the store and then, *80 feet from the tracks, her view was wide open all the way down the track,* (R-67, 144, 145, 157). The weather was clear —it was day light, about 5:30 P.M., (R-9, 161) and there was no evidence of any impairment of hearing or sight of Mrs. Swafford.

There is likewise no dispute, as we see the evidence, that Mrs. Swafford saw and heard the train, or that she *at least* gave the obvious appearance of seeing and hearing the train and stopping for the train. Other than the engineer and fireman of the train, two outside witnesses saw and heard both the car and the train *before* the accident.

One, was Petitioner's witness, Arthur Douglas (R-86-95), who saw the car when it was about 100 feet from the track, (R-91, 94). Douglas was some 450 feet Northwest of the crossing. He had heard and seen the train coming out of the East, (the horn on the train blowing), pass him and go down to the crossing, and he saw the car about 100 feet from the crossing when the train was about 200 feet from the crossing. During all the time, as shown above, the train horn had been

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*See Defendant's Exhibits A, B, C taken on December 31, 1952, the date following the accident (R-137), as identified by Appellee's witness Hardeson, (R-33) and Plaintiff's Exhibits 5 and 6, (identified R-16, 17) and received (R-19), as well as survey of the area by Plaintiff's Exhibit 14, identified (R-52 to 68), received (R-54). The crossing was clearly marked by standard railroad white flat board sign on Mrs. Swafford's approach and over 150 feet from crossing. The road and track intersect at nearly right angles.

blowing loudly. Then the train cut off his view of the car and the crossing, as the train went in front of him, (R-93, 94).

The other, Rabbit John McKeever, (R-172-183) saw the car before it got to the store, (over 100 feet from the crossing) and that as the car was about one-half the distance between the store and the tracks, *it slowed down,* giving every appearance of stopping, then, as McKeever stated: "She took off again just like it might be she say, 'Well, I can make it' and they go ahead. The next thing I hear, 'boom' and it was all over." (R-175). Thus, from the standpoint of the outside witnesses we have not only clear, loud, continuous and adequate warning of the approach of the train, (McKeever R-173, 174 and witnesses, *supra*) but an apparent observance of the signals and response of the driver of the car in slowing down to stop.

The engineer (R-161, 163) and fireman (R-148, 151) testified, as aforesaid, to the giving of signals of the approach of the train, and during the giving thereof, observed the car of the decedent when the train was some 200 feet of the crossing and the car about half of that distance, and with the car slowing down to stop. As the fireman said: "Well, at that time I took it the car was going to stop and the horn was blowing, the bell ringing. We were approaching the crossing and the next thing I knew the car had darted right in front of the engine. (R-150, 151). The engineer automatically put the brakes in full service application and I'd say approximately a second or two seconds had occurred at the time." (R-153). The car had been proceeding at a moderate rate of speed (R-175), decreasing speed and the front end bobbing down to stop (R-150)—until train was within 30 feet of crossing (R-151)—then "Boom" . . . —"she took off again * * *" (R-175, 151).

The engineer corroborated the fireman's testimony and added that the car was bobbing down—it appeared to be slowing down — when he lost view because of curve of the dash and his position on the opposite side of the diesel unit (R-164). The front end of the engine was then approximately 60 feet from the crossing. It was then too late for any human or mechanical force to avoid the inevitable collision. The engineer was unaware of the imminence of a collision until he felt the impact, at which time he made a heavy service application of the brakes (R-165).

Plaintiff Petitioner, in the face of these facts called as one of his witnesses, George Lynch, Assistant to the General Superintendent of Motor Power and Equipment of the Appellant railroad in an attempt to make some issue of negligence for the jury. The witness identified speed tape of this train at time of impact to be 63 m.p.h. (R-98, 99). The engineer and fireman estimated the speed between 60-65 m.p.h. (R-147, 161). Outside witnesses, *supra,* merely said it was going fast.

Admittedly the brakes were not applied until the impact occurred (R-164, 165) and this being a passenger train (R-161, 147) a heavy service application of the brakes was made rather than an emergency application (R-161, 165). Appellant makes much ado about the stop and the distance of some 3,060 feet traveled after the impact, with the train *then* located in the City Limits of Sarasota, (R-189) but this is *all* after the impact and death had occurred. The point of impact was over 2,900 feet outside any municipal limits.

The factual situation developed, with little or no conflict, is that the train approached the crossing at a speed of approximately 63 m.p.h. on a clear day, sound-

ing horn and bell continuously from some 1700 feet up to the crossing, with the engineer and fireman maintaining a constant look out, and the wife approaching at a slow rate of speed, with unlimited view 80 feet from the crossing, commencing to stop about 50 feet from the crossing and then darting suddenly in front of the train which was then entering the crossing and too late for the crew to have avoided the collision.

There was no issue of negligence for submission to the jury. Respondent railroad was entitled as a matter of law to a verdict of not guilty.

The *Powell v. Gary* case, *supra,* was cited with approval by the Florida Supreme Court in *Martin v. Rivers,* 72 So. (2) 789 in which verdict for plaintiff was reversed with directions to enter judgment for the railroad. As the Court stated:

> "The fireman had the right, from the facts in the record here, to believe that the deceased was in possession of his faculties and his normal senses, and that with all of the signals of danger, the extent of which were almost overwhelming, he would not walk directly into the path of a moving train. When the fireman finally realized that the deceased was not going to stop and was not going to heed every danger signal possible to give, it was too late for any human agency to extricate the deceased from the situation that he placed himself in or prevent the death which so unfortunately occurred."

Worthy of more than mere passing note is Petitioner's Counsel's opening statement to the jury, wherein he noted the essentials to his recovery and averred he would show "the train was going at a very fast rate of speed through a settled section . . . . . *that there was*

a peremptory signal, the blowing of the horn . . . . but that the tremendous speed in excess of 65 miles per hour was the principal cause of the accident." (R-7).

Not only was there no showing of a "tremendous speed in excess of 65 m.p.h., but there was a positive contradiction of the peremptory signal." It was definitely and clearly established that the horn was blown loud and clear for 1700 feet and had been and was being thus blown as the car approached with clear, unlimited view for 80 feet. The plaintiff Petitioner not only failed to carry the burden of proof but the evidence overwhelmingly established adequate signals and warnings of the approaching train and that Mrs. Swafford either neglected to see or hear what she could have seen and heard (which seeing and hearing she must do at a place where she can see and hear) or doing so, decided to go ahead, spurted out in front of the train and the accident happened.

From the decisions of the Supreme Court of Florida it is clear that no duty devolved upon those in charge of the operation by the locomotive to slow down or stop unless and until they realized that the driver of a motor vehicle cannot or will not keep off the tracks in front of the approaching train and avoid the danger of collision therewith. See *A.C.L. v. Miller,* 53 Fla. 246, 44 So. 247, *S.A.L.R. Co. vs. Tomberlin,* 70 Fla. 435, 70 So. 437, *L. & N. R. Co. v. Harrison,* 78 Fla. 381, 83 So. 89, *Dina v. S.A.L.R. Co.,* 90 Fla. 558, 106 So. 416, *Foster v. St. Louis San Francisco Ry. Co.,* 75 F. Supp. 809 and others.

The Supreme Court of Florida reaffirmed its adherence to these principles in *Loftin v. Wilson,* (Fla. 1953), 67 So. (2) 185, 191, where the Court stated:

"On the other hand, liability of the railroad company is not clearly shown. Those in charge of the train had a right to assume that the truck driver would stop a safe distance from the crossing. When they were apprised to the contrary, they were faced with an emergency brought about through no fault of their own."

As the lower Appellate Court has recognized in *ACL RR Co. v. King,* 196 F. 2d 999:

"If appellee's view that an engineer must apply the brakes *as soon as he sees an automobile approaching a crossing,* should prevail in law, trains could not run on schedule, or over crossings at more than a snail's pace. This is not the law."

Speed alone is not negligence. It in no manner can be construed as the proximate cause of this accident. No speed restriction was involved in this cause.

It is stated in *44 Am. Jur., Page 751, Railroads,* Section 511:

"In the absence of legislation, no rate of speed of a railroad train approaching a crossing is, of itself, negligent. The very purpose of locomotion by railways is the accomplishment of a high rate of speed in the movement of passengers and freight, and this the law authorized. To require railroads generally so to reduce their speeds at all grade crossings as to avoid collisions with persons who may, carelessly or accidentally, be upon the crossing when a train is approaching would defeat to a great extent, the purpose of the existence of railroads. *Outside of city limits, any speed is legitimate for a railroad train which is consistent with the safety of the train and passengers,* and under ordinary circumstances the running of a train at a high rate of speed over a city crossing is not always negligence, as where it appears that such crossing is

not frequently used, or that the train passed at an early hour when few people might be expected to be about. *Nor is the fact that a particular highway is constantly traveled by a great number of persons sufficient to render the question of negligence in running a train oper it at high speed one for the jury, where the statutory signals were given upon approaching it,* and there is nothing to show that the number of travelers was sufficient to impede progress, or otherwise make the crossing difficult and dangerous. *Consequently, when a railroad takes all necessary precautions, and gives proper warnings to prevent strangers from being injured at crossings, it seems that a recovery cannot be based on the speed of the train."* See also *154 ALR 235 and 253.*

Most recently in *Loftin v. Nolin* (June 15, 1955), 81 So. 2d 200 (Adv. Sheet), the Florida Court reiterated the principles here involved stating:

"On the other hand, it appears from this record the accident was due to the negligence of the deceased. Under F. S. §768.06, F.S.A., no recovery can be had because of his death when the sole cause was his own negligence. It is true that F. S. §768.05, F.S.A., makes the railroad company liable for the damage done unless the railroad company makes it appear that their agents have exercised all ordinary and reasonable care and diligence. In this case, it appears from the record that the railroad company and its agents exercised all ordinary and reasonable care and diligence and such being the case there is no presumption against the railroad company. . . .

"In the case of Florida East Coast Railway Co. v. Townsend, 104 Fla. 362, 140 So. 196, 143 So. 445, this court held it was the duty of the plaintiffs at least to attentively and closely look and listen for trains and to have the automobile under full control at an appropriate speed. See also Anderson v.

Crawford, 111 Fla. 381, 149 So. 656; Powell v. Gary, 146 Fla. 334, 200 So. 854.

"In the case of Van Allen v. Atlantic Coast Line R. Co., 109 F.2d 780, the United States Circuit Court of Appeals for the Fifth Circuit held that the driver drove onto the tracks and into a collision with the train without looking or listening or slackening his speed. In that case the United States Circuit Court of Appeals pointed out that this Court has repeatedly held that the action of a driver in going onto the tracks without stopping, looking, or making any effort whatever to ascertain whether a train is approaching, is in law the sole proximate cause of the injury and bars recovery.

"From the record in this case the undisputed facts show that the unfortunate accident was caused by the negligence of the decedent and such negligence was the sole proximate cause. At the conclusion of all the testimony, the Court should have granted the motion of appellants for an instructed verdict."

In addition to the Florida cases which have been cited above, the 1940 decision of the Court of Appeals for the Fifth Circuit in *Van Allen v. Atlantic Coast Line R. Co.*, 109 F. (2) 780, also supports the instant case. In that case the driver drove onto the tracks and into collision with the train without looking or listening or slackening his speed. The Court of Appeals said:

"Thus, the record affirmatively acquits defendants of negligence in the matter of signals, there being positive evidence that signals were given, and only the negative evidence of the two in the car, that they did not see or hear the train approaching, that they did not hear any signals.

"Such evidence will not make an issue in Florida against the positive testimony that the signals were given. Florida East Coast R. Co. v. Davis, 96 Fla.

171, 117 So. 842; Southern R. Co. v. Mann, 91 Fla. 948, 108 So. 889; Seaboard Air Line R. Co. v. Myrick, 91 Fla. 918, 109 So. 193.

"* * * Upon the undisputed evidence, the proximate cause was the driving on to the tracks without stopping, looking, or making any effort whatever, to ascertain whether a train was approaching. The Supreme Court of Florida has in repeated decisions held that such conduct is the sole proximate cause of an injury, barring recovery alike of driver and guest. Germak v. Florida East Coast R. Co., 95 Fla. 991, 117 So. 391; Seaboard v. Watson, 94 Fla. 571, 113 So. 716; Covington v. Seaboard Air Line R. Co. 99 Fla. 1102, 128 So. 426; Atlantic Coast Line R. R. Co. v. Miller, 53 Fla. 246, 44 So. 247; Louisville & N. R. Co. v. Padgett, 71 Fla. 90, 70 So. 998."

The Fifth Circuit Court of Appeals in *Consumers Lumber & Veneer Co. v. Atlantic Coast Line R. R. Co.*, 117 F. 2d 329, said:

"* * * It is true enough that a speed of 65, 70 or even 80 miles an hour, the speed at which the truck driver testified the engineer said he was going, is not unlawful and that the mere fact that the train was run at that speed is not of itself sufficient evidence of negligence to base a verdict on."

The Florida Court and the Court of Appeals for the Fifth Circuit, applying the substantive law of Florida both are in agreement that mere speed (if we assume a speed of 63 m.p.h. to be speed) alone is not negligence and that if adequate and timely warning of the approach of the train is given that the Railroad cannot be held liable for the negligence of the driver of a car in failing to respond to and obey such warning signals.

We submit that the record affirmatively acquits the railroad of any negligence proximately causing or contributing to the accident and shows the accident to have resulted solely from the negligence of Petitioner's decedent. The evidence cannot support a verdict for plaintiff and, accordingly, required final judgment for the Respondent Railroad in accordance with the law and decisions of the State of Florida, of the Court of Appeals for the Fifth Circuit, and an elemental application of the doctrine of proximate cause.

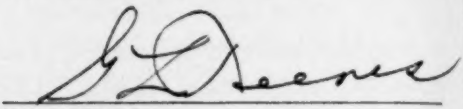
In this state of the record, it seems patent that the questions propounded in the Petition for Writ of Certiorari are misleading and inaccurate, and that this Honorable Court has been misguided into a decision wholly out of accord with the applicable law and without ever affording Respondent an opportunity to be heard.

Otherwise, this Court is endorsing a set of double standards: one for the federal courts in Florida, and another for the state courts in the application of the substantive law of Florida.

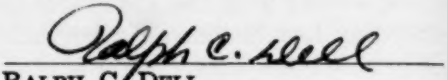
CONCLUSION AND PRAYER

It is, therefore, respectfully prayed that rehearing will be granted and that this Court will thereupon correct said error by dismissal of the writ, denial of Certiorari here or in the alternative that the said order of this Court of October 10, 1955 be modified to permit the case to be assigned for argument.

Respectfully submitted,



G. L. REEVES



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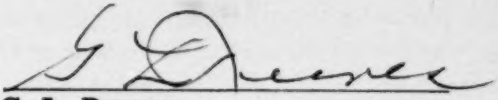
CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition For Rehearing is presented in good faith and not for delay and is in compliance with Rule 58 (1) of the Rules of this Court.



G. L. REEVES

APPENDIX

Order of October 10, 1955, omitting caption:

"PER CURIAM: The petition for writ of certiorari in this case is granted and the judgment is reversed. Mr. Justice Reed, Mr. Justice Frankfurter, Mr. Justice Burton and Mr. Justice Harlan are of the opinion that certiorari should not have been granted in this case."

No. 143. ANDERSON, ADMINISTRATRIX, *v.* ATLANTIC COAST LINE RAILROAD CO.; and

No. 261. SWAFFORD *v.* ATLANTIC COAST LINE RAILROAD CO. On petitions for writs of certiorari to the United States Court of Appeals for the Fifth Circuit. *Per Curiam:* The petitions for writs of certiorari in these cases are granted and the judgments are reversed. MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, MR. JUSTICE BURTON, and MR. JUSTICE HARLAN are of the opinion that certiorari should not have been granted in these cases. *Thomas J. Lewis* and *Richard M. Maxwell* for petitioner in No. 143. *Howard P. Macfarlane* for petitioner in No. 261. *William M. Howell* for respondent in No. 143. *G. L. Reeves, Norman C. Shepard* and *Frank G. Kurka* for respondent in No. 261. Reported below: No. 143, 221 F. 2d 548; No. 261, 220 F. 2d 901.